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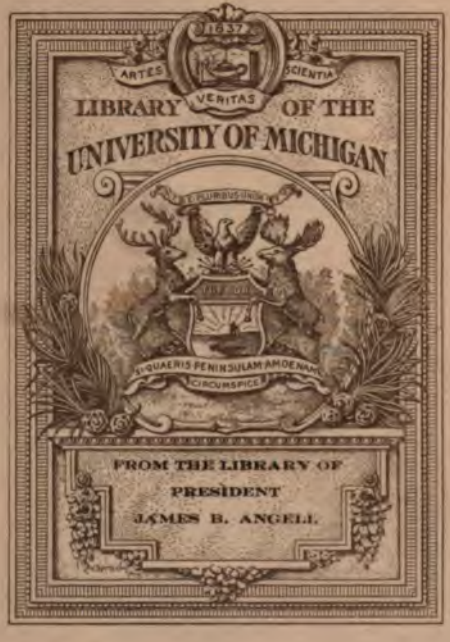
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MANUAL

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OF

INTERNATIONAL LAW,

FOR THE USE OF Midshipmen

Navies, Colonies and Consulates, 1887.

BY

JAN HELENUS FERGUSON,

MINISTER OF THE NETHERLANDS IN CHINA; FORMERLY OF THE NETHERLANDS ROYAL NAVY AND COLONIAL SERVICE.

In six Parts bound in two Volumes.

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1884.

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TO

THE RIGHT HONOURABLE

THE JONKHEER VAN DER DOES DE WILLEBOIS

DOCTOR OF LAW,

KNIGHT COMMANDER OF THE ROYAL ORDER OF THE NETHERLAND LION,

&c., &c., &c.,

HIS NETHERLANDS MAJESTY'S MINISTER OF FOREIGN AFFAIRS.

TO THE JURIST THE STATESMAN
AND THE DIPLOMATE

BUT MORE PARTICULARLY

TO

THE FRIEND

THIS WORK IS MOST RESPECTFULLY INSCRIBED

BY

THE AUTHOR.

PREFATORY NOTE.

Considering the descriptive character of the title of this Manual, it will hardly appear necessary to add, by way of preface, more than a few words, and these merely to explain the general plan of the work.

In the first place, the reader will observe an attempt here made to explain the first origin of Law. The practical rules which determine legal relations amongst Nations are so intimately connected with those which determine all moral relations, that a clear comprehension of the former depends upon a careful examination of the latter. Nothing short of a careful inquiry into the bearings which moral relations have upon the legal relations existing among Nations, will enable us to trace the first origin of International Law back to its fountain source. Hence it is evident that it would be impossible satisfactorily to expound the legal rules which govern the intercourse of States without a previous investigation of the original moral substratum of those rules.

The theory of the Moral Law of Nature, as explanatory of the origin of Law, has been sketched, in its outlines at least, in Part I. The author's views on this subject are not brought forward here with a view to claim any originality whatever, but, being the result of miscellaneous reading, they are offered to the reader as an honest attem

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to give, by means of the physiological laws of the human mind, a scientific explanation of the manifestations of the Moral Law of Nature.

The propositions brought forward for this purpose, being based on the primary consideration that the successive stages in the evolution of International Law are but so many natural phenomena, can easily be tested by modern natural science, and will therefore readily recommend themselves to all minds endowed with genuine common sense. The exposition here given of the natural laws which guided this evolution of International Law might have been elaborated far more exhaustively, and would have gained thereby in clearness, especially as regards details, but the scope of this Manual did not admit of more detailed treatment. Besides, scientific truth does not suffer by an author's individual short-comings as regards clearness of diction and exposition. Simple suggestions, thrown out to indicate the Law of Nature underlying any particular phenomenon, may often further our apprehension of the truth, though the words employed be ever so incommensurate in lucidity compared with the vividness and distinctness of our own convictions on the subject. Thus this unpretending sketch of the Moral Law of Nature will fulfil the author's purpose if it but pave the way for some better gifted mind, to give a more lucid scientific solution of the problems presented by phenomena the causes of which appear to be as yet far beyond the horizon of our present conceptions while, in fact, they might perhaps be readily explained by human Intellect combined with Feeling, when the Moral Mental Organism has been allotted its proper place in the physiology of the human Mind. All serviceable scientific hypotheses, though differing in

modes of verification, have, as stated on page 7, this criterion in common that they must be based on the assumption of a factor competent to produce all the phenomena of the respective Laws of Nature, in other words, they must be consistent with physical facts. The hypothesis with regard to the combination of Conscience and Sympathy, which two factors form the Moral Sense described under the name of Feeling on page 14, will be found, by careful and unbiassed investigation, to be consistent with physical facts and those actual relations from which all human rights and obligations susceptible of enforcement, called *Law (Jus, Droit, Recht)*, must and do proceed.

This work is divided into six parts which are grouped in two volumes, following the usual distinction made between the subjects of law and their legal relations. Every legal relation *(Rechtsverhältniss)*, says Savigni, consists of two elements, the matter or substance and the legal determination or regulation of this matter.* Hence the first three Parts, constituting the first volume, treat, besides general principles, the nature, rights and attributes of States and their institutions with regard to individual status and responsibility. The first volume, therefore, may be regarded as an exposition of the material element, that is to say, of the simple facts of international legal relations, while the second volume, in the remaining three parts of the book, discusses the mutual relations and reciprocal responsibilities of States, in peace and war, representing thus the formal element, that is to say, that by which the facts are endowed with legal significance.

Thus the first volume contains the general principles bearing on the origin of Law and expounds the manner in

* Von Savigni. System, § 52.—William Guthrie's translation of Volume VIII. (1869). Introduction.

which those principles developed through the Moral Law of Nature, into *International Law*. The first volume contains further a description of the Individual Rights of States and of the modifications which these rights undergo, in their practical contact with identical rights of other States. In this volume there are also included those special rules of international intercourse, known under the general appellation of *Maritime International Law*.

The second volume contains an exposition of the Mutual Rights and Responsibilities of States in their general normal intercourse and also the special rules and usages which devolve from that abnormal state of international intercourse called war. At the same time are treated the different conditions which exist between belligerent parties and the relations existing between these parties and those who do not take any active part in the conflict, called neutrals. Lastly those proceedings are explained through which the re-establishment of peace is brought about, by means of preliminary negotiations and treaties of peace, with or without interference of neutrals.

But in compiling the present work the author had above all to comply with the main requisite of a Manual, viz., that the arrangement of the subject matter be so methodical as to facilitate practical reference and that the treatment be so concise as to impress itself readily upon the memory of the reader. Consequently a Manual has to be written with as much brevity as clearness will allow, and with as much succinctness as the breadth of the subject permits. For these reasons the author was limited in his plan with regard to the division of the subject matter as well as with regard to the execution, and ventures to mention this as a plea for the indulgence of his readers.

The Manual of International Law, which is hereby offered for the use of *Navies*, *Colonies*, and *Consulates*, is a compilation of notes, gathered in the intervals of business, and of occasional observations and impressions which accumulated during an active participation, successively, in the duties of these several branches of the public service, and which are now brought together into a popular form.

The object aimed at was not a profound or scientific treatment of International Law, which has formed already the task of far better and competent writers of text-books, but to furnish a Manual for practical use and ready reference in the hands of those who have no occasion or time to consult elaborate text-books, while their particular situation, far away from the respective centres of legal consultations, instructions or guidance, renders the pressure of business or professional exigencies the more felt, as prompt action, in some decided direction, is often of great consequence. To this end a compendium of the practical rules of International Law and Jurisdiction is surely a desideratum. In how far we have succeeded to supply such a want, we must leave others to judge, as no one can better find out the merits or faults of a work like this than those who put it to the test of practical use. The author's sole aim in publishing the present work being to render some service to those whose profession brings them often face to face with the practical requirements of International Rules and Usages, the author would feel amply recompensed for his labour, if this book should produce no other result than that of merely inducing some abler writer to produce a far superior work of practical utility.

J. H. F.

Peking, August, 1883.

PART I.

GENERAL PRINCIPLES.

CHAPTER I.

THE ORIGIN OF LAW.

§ 1.—Social life is the natural consequence of the human organism and, as such, necessarily develops itself in conformity with the Universal Law of Nature. *§ 1 The Universal Law of Nature.*

The *Universal Law of Nature* is the composite effect of the various natural conditions which are at work in the Universe and which are called Laws of Nature, in consequence of the regularity with which they appear to our consciousness.

As laws are the manifestations of forces, and effects always indicate causes, we are accustomed to call the causes of these natural conditions the forces or powers of Nature. For the same reason the Universal Law of Nature, which is the constructing unity of the systems formed by the Laws of Nature, is correlative to the idea of a Universal Cause, Force or Power, and as this First Cause is made known to us, by irrefragible induction, as the absolute motor, force or life of all that we are conscious of in Nature, it may be represented, by way of a hypothesis which is based on natural phenomena, by the term *Spirit of Creation.* *The Spirit of Creation.*

In inorganic and organic evolution, the Spirit of Creation is presented to our senses by the forces in matter and by the vital element in organisms. In the evolution of the mind, on the other hand, the Spirit of Creation is presented to our senses by that consciousness of its influence,

which is called the *Soul*, that is to say the highest development of that motive power in the evolution of the mind known as *Feeling*, which will be described in the following pages.

Hypotheses in general.

Thus it is to Matter and Force, which constitute the primary manifestations of the Absolute, that all natural phenomena must be traced.* But Science is not yet able to trace all natural influences, by consistent induction, to their primordial causes, nor has Science reached as yet "that highest unification which Philosophy seeks." We are often hardly aware of the effects of the Laws of Nature, which in scientific language are called *phenomena*. Thus philosophical or speculative reasoning must often supply the place of Science, or it has, under the name of *hypothesis*, to be slipped into some scientific formula to pave the way for its comprehension by the human mind. Such is the case with all methods adopted for the purpose of explaining the course of the development of the Laws of Nature. Thus it is also with the interpretation of natural phenomena in the description of organic evolution, through reproduction, perpetuation and modifications of the forms of living beings—(not of their *origin*, as people unacquainted with Darwin's works often think)—in the manner described by Professor Darwin in his famous books, called "The Origin of Species" (the term Species being the scientific equivalent of *forms* of organisms) and "The Descent of Man." Darwin's theories regarding

* "A further inference was, that Philosophy, as we understand it, "must not unify separate concrete phenomena only; and must not "stop short with unifying separate classes of concrete phenomena, "but must unify all concrete phenomena. If the law of operation "of each factor holds true throughout the Cosmos; so, too, must the "law of their co-operation. And hence in comprehending the Cosmos "as conforming to this law of co-operation, must consist that highest "unification which Philosophy seeks." HERBERT SPENCER. First Principles, § 186.

the causes of the developmental changes in the structural forms and physiological functions and properties of organisms, called variation, adaptation, survival of the fittest, &c., are hypothetical statements of causes which, (whatever may be the controversial nature of philosophical assumptions, when taken up in scientific propositions), go far towards forming a development hypothesis explanatory of the Universal Law of Nature, or what we called the manifestations of the Spirit of Creation, by aiding the human mind to infer, with the nearest possible accuracy and with a prestige of scientific plausibility, the existence of causes which it could not arrive at through direct demonstration.* These hypothetical suppositions are at present indispensable to natural science in general, but particularly to physiology and psychology, in order to supply the want of sufficient data to fill up the gaps yet remaining in the corroboration of facts, as well as to make up for the imperfection or inadequacy of our Physico-Mental Organism, called Reason. "The privilege," says Professor Oscar Schmidt, "on which the progress of Science generally relies, is that of investigating, according to determined points of view, and accepting probabilities as truth in the garb of scientific conjecture or hypothesis."†

* Evolution, whether by the process of successive changes of conditions "through multiplication of effects," as Mr. Herbert Spencer described it before Darwin, or by natural selection, which is the Darwinian theory, or whether both combined, (as Mr. Herbert Spencer accepts it, in the Fourth Edition [1880] of his "First Principles"), is as good as an established fact of history, but the causes of these effects are yet a hypothesis, and it is with truth that Professor Huxley said on the evidence of palæontology: "the evolution of many existing forms of animal life from their predecessors is no longer an hypothesis, but an historical fact; it is only the nature of the physiological factors to which that evolution is due which is still open to discussion." *(Encyclopædia Britannica, 1878).*

† PROF. OSCAR SCHMIDT. The Doctrine of Descent and Darwinism. Chapter on the Pedigree of Vertebrate Animals (Henry S. King & Co., London, 1875), p. 248.

"Do not allow yourselves," says Professor Huxley, "to be misled by the common notion that a hypothesis is untrustworthy simply because it is a hypothesis. It is often urged, in respect to some scientific conclusion, that, after all, it is only a hypothesis. But what more have we to guide us in nine-tenths of the most important affairs of daily life than hypotheses, and often very ill-based ones? So that in Science, where the evidence of a hypothesis is subjected to the most rigid examination, we may rightly pursue the same course." Further on he says: "There is a wide gulf between the thing you cannot explain and the thing that upsets you altogether. There is hardly any hypothesis in this world which has not some fact in connection with it which has not been explained; but that is a very different affair to a fact that entirely opposes your hypothesis. In this case all you can say is that your hypothesis is in the same position as a good many others."* Hypotheses are, with regard to the nature of the evidence required for their verification, of three distinct classes, viz.: *physical*, *mental* and *moral*, and must accordingly be tested by evidence answering to the correlative Laws of Nature. A hypothesis based on physical causes, must be verified through demonstration of the working of the forces inherent in matter. It is to be tested by the Physical or Chemical Laws. A hypothesis built on purely logical bases, is to be verified through abstract mathematical or logical reasoning. It is to be tested by the Mental Law. Finally, a purely moral hypothesis requires verification by inward conviction of what is morally right or wrong. Its test lies in the Moral Law.

* PROF. THOMAS H. HUXLEY. Lectures on "Origin of Species." Humboldt Library of Popular Science Literature, Vol. I, pages 518 and 529.

The latter is the most subtile of all, as being the youngest Law of Nature, that is, the latest addition to the chain of evolution in which the human mind shares; a law whose abstruse subtility necessitates our pushing our investigations into tenuous and recondite truths, based on Reason and Feeling combined (§2). Though differing in modes of verification, hypotheses of all classes have this criterion in common, that they must be based on the assumption of a factor competent to produce all the phenomena of the respective Laws of Nature, of which the *veræ causæ* are undemonstrated or inconceivable to our mind. This is the standard rule in all attempts to describe the Laws of Nature, whether physical, mental, or moral, and on this principle the following hypothesis of the general development of the Universal Law of Nature is proposed.

Hypothetical demonstration of the Universal Law of Nature in its course of Evolution.

A general observation of Nature, as it appears on our globe, indicates that the development of the Universal Law of Nature has taken place gradually, as by stages, which may be called stages of Creation, while the influence of the Spirit of Creation, which is the originative cause of the forces operative in Nature, is manifested through all these stages, admitting of no line of demarcation between the different stages;—so that by the latter term we mean merely a generalization of groups of bodies or objects in which a particular force or law of Nature becomes more conspicuous to our observation.

Submitting six of these stages to a general review, and including what we think to be the *beginning* of those objects represented to the present state of consciousness of the human mind (that is to say the *first* stage) up to the stage in which we exist at present (that is to say the *sixth*

stage), we find that the evolution of the Universal Law of Nature, through the gradual development of the different forces of Nature, is manifested as follows.

Matter. When Matter,—which term is but a symbolic name for that simple substance, which could as well be called *consolidated* or *latent force*, and constitutes the original groundwork of creation,—is formed into compound substance, through the operation of the forces whose influence is perceivable in the Physical or Chemical Law (which law includes all isomeric and isomorphous transformations of inorganic matter, and all decomposite combinations of compound substances), the first stage in Creation is accomplished. The motive or vital power, which emanates from the Spirit of Creation and manifests itself already in the Physical Laws through the chemical metamorphoses and other phenomena of matter and forces, appears more developed in the second stage, which is the reign of the Law of Vegetable Organism.

Animal life belongs to the group that may be styled the third stage, that is to say the sphere of the Law of Animal Organism, while the fourth stage is the province of the Law of developed Animal Organism or Instinct, and represents the highest stage in Creation in which animals not endowed with reason are found.

The appearance of the human Mind on Earth constitutes the fifth stage of Creation, that is to say the reign of the Law of Physico-Mental Organisms. This stage includes the intellectual faculties of man, considered as the species, such as he generally appears all over the Earth, developed through successive evolutions from the first principles of Matter, to a complete, erect and stalwart form of being, endowed with a material nature and animal propensities, but with that

higher physiological development of animal instinct and mental faculties which in the case of man are called Reason. This species is the perfect man of the materialist. But man's development, or, strictly speaking, the development of his mind, does not stop here, for by degrees corresponding with his social progress, and in the same proportion as the surrounding conditions were more or less favourable to the adaptations of his moral organism, he has entered the sixth stage,—that is to say the sphere of the Moral Law, which governs that highest order of Creation at present known on the Earth, viz., our Moral and Mental Organism, in other words, the moral development, through which *consciousness of the Good*, which is the perfect harmony of Justice and Benevolence, is created in the human mind. Here the struggle for material existence is accompanied and often neutralized (as manifested in martyrdom) by the fiercer strife of the moral element of Nature in its struggle to maintain its existence in opposition to the surrounding animal propensities, a battle which follows the line of evolution from the lower to the higher mental organism, through development and adaptation of the higher moral and mental organs, and leads up, in gradual progression, to that harmonious combination of Justice and Benevolence in the human mind, which is the manifestation of the Good, and which prepares the mind for the conception of the Soul (§2).

Struggle between the moral and the material elements.

Martyrdom.

This process in the evolution of human Mind may be called Moral Selection and Survival of the fittest, in contradistinction from gradual retrogression, through degeneration of the moral organs and sometimes total suppression of the same, caused by want of application or through disuse of these faculties, in which cases the mind re-

Materialism.

mains within the range of a lower stage of moral development, or gradually sinks back to that state of soulless Materialism, unguided and unchecked by Moral Sense, in which only impulses of the animal propensities can claim an acknowledged natural influence. *

Origin of Species. Thus the different forces or powers of Nature constitute in their successive combinations, as united by the motive element of the Spirit of Creation, the different stages of Creation, in which the Universal Law of Nature represents itself to human consciousness in the form of groups, as stated above. Each group has its own peculiar classes of bodies or objects, embracing countless developed forms and varieties of forms, called *Species*, and coming on the scene in the course of each stage at the point at which the respective Power, or the Law which is the manifestation of that Power, predominates in Creation. The various objects and classes of objects of organic nature have each its own inherent constituent qualities, and find their respective places in Creation through

* "If the process of continuously adapting organisms to their environment takes place in Nature at all, there is no reason why we should set any limits on the extent to which it is able to go, up to the point at which a complete and perfect adaptation is achieved." GEORGE J. ROMANES, M.A., LL.D., F.R.S. "*The Scientific Evidences of Organic Evolution*," Nature Series (Ed. 1882, page, 5). "Now, not only is it rational to infer that changes like those which have been going on during civilisation will continue to go on, but it is irrational to do otherwise. Not he who believes that adaptation will increase is absurd, but he who doubts that it will increase is absurd. Lack of faith in such further evolution of humanity as shall harmonise its nature with its conditions, adds but another to the countless illustrations of inadequate consciousness of causation. One who leaving behind both primitive dogmas and primitive ways of looking at things, has, while accepting scientific conclusions, acquired those habits of thought which Science generates, will regard the conclusion above drawn as inevitable. He will find it impossible to believe that the processes which have heretofore so moulded all beings to the requirements of their lives that they get satisfaction in fulfilling them, will not hereafter continue so moulding them. HERBERT SPENCER. "*The Data of Ethics*." Chapter X. § 67.

development in conformity with the Universal Law of Nature, and having sprung up through the Law of Nature governing the particular condition of the substances of which they are respectively constituted, they appear as distinct off-shoots of the main trunk which, gradually growing, throws out higher branches, each giving origin, in its respective line, to countless shoots of its own, whilst the same source feeds all, and each derives its organic life from the same Motive Power and Universal Cause.

The Links of Evolution.

The links of evolution cannot be looked for amongst the Species. We are obliged to reduce these vast masses of observations to general laws, to find some main solution for the development of Nature through evolution, for, by searching in the by-paths of creation, we are apt to lose the main track, while looking in vain for many a missing link.

By the foregoing hypothesis the development of the Universal Law of Nature or of Creation on Earth, or, in other words, the evolution of Nature on Earth, is represented as a chain of continued progress, with links of which each is necessary as a base for the continuation of the next, forming a system of mutual dependencies, for each serves, in its special sphere and to its full extent and capacity, for the development of the other. These links are the combined results of the different powers of Nature, and that these powers are all subject to the influence of one Universal Cause, is manifested by the systematic development of Nature, called *Evolution*, the factors of which are Matter, Force and Life, which, in the case of mental organism, are combined with Feeling.

Impossibility of demonstrating the primary motor of Evolution.

But neither the nature of these forces, nor what is called Matter, nor the origin of Life or of Feeling, the immediate motor of evolution in organic nature, are explicable by Science or by any system of logic in the description of Evolution, that is, by any evidences from the Physical or Mental Law. No better exhibition of the inadequacy of Science, which is the highest power of conception of the Physico-Mental Organism of man, could possibly be given than by quoting the words of Mr. Herbert Spencer with which he concludes his chapter on Ultimate Scientific Ideas. "Ultimate Scientific Ideas, then, are all representative of realities that cannot be comprehended. After no matter how great a progress in the colligation of facts and the establishment of generalizations ever wider and wider—after the merging of limited and derivative truths in truths that are larger and deeper has been carried no matter how far; the fundamental truth remains as much beyond reach as ever. The explanation of that which is explicable, does but bring out into greater clearness the inexplicableness of that which remains behind. Alike in the external and the internal worlds, the man of science sees himself in the midst of perpetual changes of which he can discover neither the beginning nor the end. If, tracing back the evolution of things, he allows himself to entertain the hypothesis that the Universe once existed in a diffused form, he finds it utterly impossible to conceive how this came to be so; and equally, if he speculates on the future, he can assign no limit to the grand succession of phenomena ever unfolding themselves before him. In like manner if he looks inward, he perceives that both ends of the thread of consciousness are beyond his grasp; nay, even beyond his power to think of

as having existed or as existing in time to come. When, again, he turns from the succession of phenomena, external or internal, to their intrinsic nature, he is just as much at fault. Supposing him in every case able to resolve the appearances, properties, and movements of things, into manifestations of Force in Space and Time; he still finds that Force, Space, and Time pass all understanding. Similarly, though the analysis of mental actions may finally bring him down to sensations, as the original materials out of which all thought is woven, yet he is little forwarder; for he can give no account either of sensations themselves or of that something which is conscious of sensations. Objective and subjective things he thus ascertains to be alike inscrutable in their substance and genesis. In all directions his investigations eventually bring him face to face with an insoluble enigma; and he ever more clearly perceives it to be an insoluble enigma. He learns at once the greatness and the littleness of the human intellect—its power in dealing with all that comes within the range of experience; its impotence in dealing with all that transcends experience. He realizes with a special vividness the utter incomprehensibleness of the simplest fact, considered in itself. He, more than any other, truly *knows* that in its ultimate essence nothing can be known."*

This proves the inability or inadequacy of our Physico-Mental Organism and explains the reason why the Spirit of Creation, the Absolute Cause of all, and its actions on the human mind are undemonstrable by Science or, in other words, incomprehensible to the mind through Reason, unaided by the prevision of that herald of a

* FIRST PRINCIPLES, Chapter III. *Ultimate Scientific Ideas.* § 21.

nobler conception, which in Evolution is called Feeling, and which quickens the physico-mental functions into the higher development of the Moral-Mental Organism, in the sphere of which it is called the Soul.

Intellect.

Reason is the evolved result of different impressions of Experience as adapted to actual physiological conditions. Those impressions, vivified and brought into relationship with each other by the ever growing motive power of Feeling, have gradually developed, through evolution from Instinct, into what is called Intellect, the basis of the higher mental development.

Hypothesis regarding Intuition.

Feeling.

With the foregoing propositions we couple the following hypothesis regarding *Intuition*. The element of our Moral Mental Organism, which has above been designated by the simple term *Feeling*, is the germ from which the Human Soul develops. This essential substratum of the *Ego* of our state of consciousness, constitutes a law of the conscious mind, and forms the condition under which we think when the mind, having entered into its full intellectual and moral development, is unbiassed, pure and unshackled by *à priori* theories. Deriving its origin from Life itself, Feeling is ever present, though in a latent form, in all organisms. Foreshadowing in its gradual development, with its innate susceptibilities, the successive stages of evolution, Feeling is ever the forerunner, the nascent motor of a higher mental development, and is already manifested in that spontaneous lucidity of Instinct, bordering on Reason, which we are so often astonished to observe in animals. Forecasting the adaptations of Intellect, Feeling becomes permanently conspicuous at the first dawn of Reason, of which it

is ever a concomitant in the human mind, whose continued evolution and adaptation to a higher form of organism it presages. Feeling underlies all our scientific speculations, and helps them through every dead lock of the mechanism of Reason; indeed without its stimulating and subtile vitality, this mechanism would stop, just at the point where its forces are most wanted for the progress of Science. For this progress is mainly due to hypotheses based on Primary Truths, but the basis of all hypotheses, even of those regarding the most positive science, is Feeling, for Truth is *felt* where Science cannot procure any evidence for demonstration. Feeling is, accordingly, systematized Intuition in those mental organisms which have reached a higher stage of development. Hence, the more the human mind advances in its course of development, the more is Feeling pre-eminent, and the more extensively and consistently will it be listened to. Genuine Feeling will then be kept free from the delusive influence of *Imagination*, which latter is often mistaken for the former. But Imagination is the faculty or combination of faculties by which certain ideas are evolved in the mind, whilst Feeling is the final criterion by which these ideas, created by Imagination, are tested, when Reason, overpowered by Imagination, is not to be trusted or is inadequate for its functions. Imagination is thus merely the effervescence of Reason, which sometimes produces ebullitions dangerous to the stability of the mind, whilst Feeling, constant and constructive as all the Laws of Nature, is the regulating principle of Reason. Being concomitant with Reason, it connects human consciousness with the *Unknowable*, with that Inscrutable Cause which manifests itself in the Universal Law of Nature, by causing us to feel intuitively

Feeling versus Imagination.

what is undemonstrable to Reason, and thus to exercise, as nearly as possible, the same kind of control over the unknowable world as that which we already possess in respect of the phenomena of the material world. As such, it is recognizable as the Soul, which unites the human creature with its Creator.

The Soul.

The Soul is the highest manifestation of that power of nascency in the evolution of mental organism which is described here as Feeling. The influence of the Spirit of Creation, as noted above, is manifested in motion, observed in the process of Evolution, *i. e.*, the process of forces in matter, which it quickens into organism, and, working on this, gives impulse to the respective processes of development and growth, in conformity with the general progress of the Universal Law of Nature, of which it is the Power. "The Power which the Universe manifests to us," says Mr. Herbert Spencer, "is utterly inscrutable."* This First Cause, or Absolute, this fountain-head of all laws, physical and moral, with their all-pervading principles, which we call *the Spirit of Creation*, transcends human knowledge, and is inconceivable to the human mind, which can only perceive its effects in Matter, when it is called Force; in Organism, when it is called Life; and feel, through that special innate faculty of the highest organism of the Mind in evolution which is called Feeling, its impulses and inspirations, which constitute the *Soul*. The influence of the Spirit of Creation in the evolution of the Mind not being perceivable through Sense, as in the inorganic and organic evolutions, this influence is made cognizable to the Mind through the Soul,

* FIRST PRINCIPLES, § 14.

which is then presented to our consciousness as the relation which exists between our Moral-Mental Organism and the Spirit of Creation; in other words: the Soul is the active agent of the Spirit of Creation in the process of the higher evolution of the Human Mind (§§ 2–7). If the Mind is in an abnormal or unsound state, through complete moral depravity or physical unfitness for moral or rational conception, then the current of communication between the Soul and the Mind is suspended, the ray which enkindled Feeling and Righteousness is excluded, the spiritual life is suppressed, and the body is then *morally* dead, being then only animated by the common animal instinct, or by those shreds of intelligence which sometimes cling to the human mind after Reason and Feeling have become extinct. When derangement or decomposition of the physical organs obstructs the circulation of the blood, physical life is impossible; thus it is with spiritual life, when the mind is unfit to receive and develop the impulses of the Soul (§§ 3–7).*

The Moral Law of Nature is the Origin of Law. (JUS, DROIT, RECHT).

The Human Mind,—by which term is designated the individual subject of thought, perception and conception in general, with all the correlative functions of consciousness and volition,—is able, when in sound normal condition and activity, to exercise its natural powers and susceptibilities in various mental operations. Those powers and susceptibilities are called Faculties, and have distinct functions, distinct modes and spheres of activity. The conditions under which this

* "Then shall the dust return to the earth as it was, and the spirit shall return into God who gave it." *Ecclesiastes*. XII. 7.

"There is a spirit in man, and the inspiration of the Almighty giveth them understanding. Who teacheth us more than the beasts of the earth and maketh us wiser than the fowls of Heaven." JOB, XXXII. 8, and XXXV. 10 and 11.

takes place constitute the Mental Law, so far as these conditions regard the connections of the Mind with bodies outside the Mind; and the same conditions constitute the Moral Law when regard is had to the inward relation of the Mind with the Soul. This relation is manifested through the Moral Senses, called Conscience and Sympathy, which distinguish the human mind in its highest pitch of development from the rest of creation on Earth, and it is through these Moral Senses that the Moral Principles or Moral Truths are developed in the human mind. These Truths are the principles of Ethics, the moral rules of man's conduct, individual as well as social (§§ 5–7). Thus, by the development of the human mind, through the Moral Law of Nature, aided by suitable surroundings of social conditions, the moral obligations, which constitute the main guidance of men's acts, are developed, controlling the individual moral conduct of man as well as regulating his relations with his fellow-creatures. These moral obligations form the basis of the rules which regulate the conditions of the social relation of men, called Law *(Jus, Droit, Recht)*, the special aspects of which, as bearing on the relations which exist between different societies or aggregates of individuals, are treated in this work.

CHAPTER II.

DEVELOPMENT OF THE MORAL LAW AND CIVILIZATION.

Primary Truths.

§2. Primary Truths or First Principles are brought under the cognizance of the Mind through the intuition of Feeling, as stated in §1. These Truths are ideas which are fundamental to and presupposed in the operation of the understanding; they are, however, not furnished by sense awakened in the mind on occasions of material experience, nor are they produced by sensuous experience, for they spring up in the mind as by intuition whenever the fitting occasion is presented; whence it may be inferred that they are conceived in the mind through the special power of Feeling, operating under appropriate circumstances.*

These Truths are of two distinct classes, viz.: *Physical Truths*, the principles of the physical laws of nature; and *Moral Truths*, the primary ideas of right and wrong, which are the First Principles of Justice, (§5). These latter form the subject-matter of the present chapter.

In the preceding section we have noticed that Feeling and Soul are one and the same phenomenon of manifestation of the Absolute, being called Feeling in the sphere of the Mental Law and Soul in the sphere of the Moral Law. The latter term, Soul, is used, in the same sense, in the description of the development of the Moral Law and Moral Civilization.

* JOSEPH HAVEN. Mental Philosophy. Ed. 1878, page 34–229.

The Good.

The source of moral development, from which mankind derive the impulse for the continuation of the strife in the progress of civilization in its purest nature, is the Soul. Emanating from the Spirit of Creation,—the Absolute Cause of the Universal Law of Nature, and the fountain-head of Perfect Good,—the Soul imparts to the human being, through its Moral-Mental Organism (§1), the nature of the *Good*. The Good is not what is agreeable or disagreeable to the senses, nor any concept of speculation based on the principle of utility, though it is intimately connected with general welfare. It is the perfect harmony of Justice and Benevolence, which constitutes the Moral Law of Nature, the parent of all virtues.

The Moral Senses, viz., Conscience and Sympathy.

These two elements of the Good, as revealed to us through intuition by the Soul, are presented to our consciousness through the moral senses, viz., Conscience and Sympathy (§1). Conscience impresses on the mind the distinction between right and wrong, and the principles of Justice, which constitute the Law of Conscience. Sympathy, on the other hand, is the moral sense through which the emotions, which engender the disinterested affections called Benevolence (§§ 5–7), are awakened in the mind.

Righteousness.

The conception of the one is not necessarily preceded or followed by the emotion of the other. They are co-existent in the sound and pure mind, and, though distinct, stand in equal counterpoise in the balance of *Righteousness*, which is the state of purity of the human mind when in perfect harmony with the Soul. Justice is the rule of right conduct and duty, as dictated by Conscience, which keeps alive the awful sense of right and wrong. But Benevolence, which is the reflection

in the pure mind of the Creator's love for its creatures, allows no rules to be imposed upon human nature except such as the frail human powers are able to bear, and such as are beneficial to the progress of mankind, without overtasking its strength. For Justice, apart from the moderating control of Mercy, degenerates into despotism, and from despotism into tyranny. But to keep Benevolence free from any bias to laxity or excessive lenity in procedure, which might encourage lawlessness in the human mind, Conscience, which approves of and commands just actions, can forbid the Will to contribute to the gratification of Sympathy whenever affections, excited by Imagination, become dangerous to that genuine Benevolence which is in perpetual agreement with the principle of Righteousness.

Thus the Good is presented to our mind, through the Soul, as a state of perfect harmony between Conscience and Sympathy. Hence, the more these Moral Senses are developed, the stronger is the conception of the Good in the Mind.

Akin to their common source, viz. Feeling, both Conscience and Sympathy likewise derive their origin from Life itself and pass, with the latter, through all stages of Evolution. Both Conscience and Sympathy are sometimes, to a certain degree, manifested in animals, especially when those powers are awakened by training, but their harmonious combination, effected through the Soul, is developed in the higher stage of mental Evolution, which is called the Moral-Mental Organism. This harmony is the manifestation of the Moral Law of Nature, and thus manifests the influence of the Soul in the human Mind. The Moral Law of Nature, by establishing the dis-

tinction between virtue and vice, is as essential for the moral government of Creation, in the accomplishment of the progress of the Evolution of the human race, as the other Laws of Nature are for the material and organic development of the universe. *

As Justice is the right Reason, so is Benevolence the right Sentiment. Both are impulses of the Soul, proceeding from the divine elements of Justice and Mercy, which, when combined, produce the disinterested affections or virtues called piety, humanity, love, integrity, modesty, chastity, faithfulness, temperance, self-control, patience, self-sacrifice, manliness, self-respect, and the noble passions of courage, indignation or disinterested aversion to wrong, and all further impulsive ardor towards the good, the great and the beautiful.

The Standard of the Good.

All manners of conduct which are styled *Virtues*, are marked by an intrinsic similarity of character, through having a common source. This source is the Moral Law of Nature, the Standard of the Good, which is manifested to the human mind in the perfect harmony of Conscience and Sympathy. Good and evil, or right and wrong, are thus, by no means, va-

* As it is with the physical, so it is with the ethical. "A belief, as yet fitful and partial, is beginning to spread amongst men, that here also there is an indissoluble bond between cause and consequence, an inexorable destiny, a law which altereth not. Confounded by the multiplied and ever-new aspects of human affairs, it is not perhaps surprising that men should fail duly to recognise the systematic character of the divine rule. Yet, in the moral as in the material world, accumulated evidence is gradually generating the conviction, that events are not at bottom fortuitous; but that they are wrought out in a certain inevitable way by unchanging forces. In all ages there has been some glimmering perception of this truth; and experience is ever giving to that perception increased distinctness. Indeed even now all men do, in one mode or other, testify of such a faith. Every known creed is an assertion of it." HERBERT SPENCER. *Social Statics*. Edit. 1883, page 54.

riable or merely relative qualities, changing with temporary circumstances of civilization. The value of man's ethical judgment, his conception of the Moral Law of Nature, naturally varies in conformity with the degree of development to which his Moral-Mental Organism attains. Hence it comes that certain acts are in some particular stage of the development of this organism, through deficient development of the Moral Sense, regarded as indifferent, as matters with which morality has no concern; that certain acts are, in conformity with the relative state of ethical valuation, deemed expedient, which in the respective stage of moral development is tantamount to good, whilst the very same acts are, in another more highly developed stage of civilization, condemned as actually vicious. When we clear away from the path, which this development has gradually traversed in the history of the human race, all desultory human acts prompted by special motives of expediency or caused by the contending propensities of mankind, in its struggle for moral existence, we cannot fail to acknowledge that the working of the Moral Law of Nature is plainly manifested through the mist of ages and in the midst of what, at first sight, we would think hopeless barbarism. Side by side with the greatest deviations from this law, caused by the lower animal propensities of the human mind, the history of mankind shows often the most lucid appreciation of the Good, traits of harmony with that universally acknowledged standard, the Moral Law of Nature. This Law of Nature, the standard of the Good, is ever the same. The appearance of differences in the valuation depends upon the standard of ethical judgment, that is to say upon the state of the *Popular Conscience* and

the development of the *Spirit of Law* in the respective stage of civilization (to be described in §§ 10 & 11), which is the exponent of the relative state of development of the Moral-Mental Organism of man. The Moral Law of Nature is, in the natural course of the evolution of the human mind, growing into that state of preponderance, which forms what we termed above the sixth stage of creation on Earth, but its progress is often checked by the animal propensities of the lower stages, though its development is undeniably traceable in the history of mankind as a whole.

Origin of Evil and its control.

§ 3. Against this harmony of the Moral Law, which is the creative element of the Good, there is constant war waged, through Imagination,—that active author of evil thoughts in the mind when wrongly excited,—on the part of the rapacious selfish inclinations of man's animal nature. This war manifests itself by the countless forms of vices, which are caused by love of power, by feelings of ambition, envy, jealousy, love of wealth, lewdness and by other animal appetites. Unless checked by Conscience and right Sentiment, those vices produce a habit of malignity, which, as the reverse of Righteousness, is the state of depravity of the human mind when not under the ennobling influence of the Soul. *

The worst of all is that Imagination, that parent source of the evil thoughts, which arouse our animal propensities by exciting the material nature of man, creates by its hallucinations false

* "I delight in the law of God after the inward man: but I see a different law in my members, warring against the law of my mind and bringing me into captivity under the law of sin, which is in my members." ROMANS. VII. 22 & 23, and Romans. VIII. 1.

virtues. What is only covetousness based on rapacity, is represented by Imagination as a noble ambition striving to reach the Great and the Good. What is only vanity based on brutish propensities, is held up by Imagination as courage, as a noble passion of disinterested self-sacrifice, which in reality can only originate from sympathy with the welfare of our fellow-creatures. Finally, alas! the brutish desire of lewdness,—that vilest of our animal inclinations,—is represented by Imagination as the pure but unguarded virgin mind, under the influence of the affections of the heart. Lewdness is thus represented as if it were the noblest conception which the human mind is capable of,—as love. But the baneful influence of Imagination on Reason is here easily detected, if the Will is but strong enough. Love is based on moral duty, and love which is not reconcilable with duty marks itself as that spurious compound of base desires which is but the product of Imagination, and which cannot stand the test of the Moral Law of Nature, because the Good is manifested in perfect harmony of Conscience and Sympathy, which arises when Conscience and Heart, Reason and Feeling agree.

When fanciful Imagination is inflamed by the passions of selfishness, and, unfettered by judgment, reasoning, knowledge, truth or facts, takes entire possession of the mind's field, she becomes then the active agent through which malignity is instilled in the human mind. Imagination, the creative power of the ideal, so beautiful and sublime in her pure state, so useful an agent and so indispensable for success in poetry, music, and in the plastic arts and sciences, to minds of a high order, in the invention of new combinations, through happy conjecture, supposition or inven-

tion,—is the fiend of the human race whenever she becomes the servant of malignant passions. As Conscience is the moral faculty of Justice, and Sympathy that of Benevolence, thus also is a vitiated Imagination the parent of Vice. *

But fortunately for man, his mind is so constituted that the evil, engendered by his animal nature, can be neutralized, and the power of a vicious Imagination counteracted, in its own sphere, by another faculty of the mind called Attention. This is the power the mind has to direct its thoughts towards any given object to the exclusion of others. As both of those faculties are under the control of the will, it only requires strength of will and discipline of the mind, and the growth of evil, which is engendered by a corrupting Imagination, will be checked by fixing Attention on the Good to the exclusion of all evil thoughts. If you have the good luck to possess any,—and be it only *one*,—bright recollection of some former state of harmony between your actions and the Good, bring that up in your mind and fix attention on it, and it will save you; for this thought gives pleasure, and shews that there exists no happiness outside the Good, while it predicts the pains of the reverse. This anchor is safe, for it is cast in good holding ground, provided that the cable of your attention on the Good does not part, but succeeds in arousing the determined resistance of the mind to all aggressions of the awakened selfish passions and desires of the animal nature, which are

* "Imagination.....cette superbe puissance, ennemie de la raison, qui se plait à la controler et à la dominer pour montrer combien elle peut, en toutes choses, à établir dans l'homme une seconde nature. Elle a ses heureux, ses malheureux, ses sains, ses malades, ses riches, ses pauvres; elle fait croire, douter, nier la raison, elle suspend les sens, elle les fait sentir; elle a ses fous et ses sages: et rien ne nous dépite d'avantage que de voir qu'elle remplit ses hôtes d'une satisfaction bien autrement pleine et entière que la raison." PASCAL, *Pensées*, Art. III. 53.

so fatal to purity of mind, a requisite indispensable for the maintenance of relation with the Soul. But strength of will and discipline of the mind cannot be attained except by earnest effort, by resolute purpose and diligent training, for "the spirit truly is willing but the flesh is weak."

Religion.

This moral training of the mind is essential for the completion of our moral organization and for the maintenance of strength sufficient to guard us from the evil of our own nature, by preserving us from those temptations which are engendered through evil thoughts, by means of keeping the mind in constant communion with the Good. Now this moral training of the mind is the province of the religion, which teaches how to keep the Mind sound and pure, and in perfect harmony with the Soul. We mean that religion which teaches Divine Love, and shows how Eternal Justice is mitigated by Mercy for the gradual elevation of mankind. That religion is, in fact, the only religion operating in perfect harmony with our Moral-Mental Organism; —provided we do not wilfully spoil this most sublime result of Evolution, the work of Creation on Earth, which forms the corresponding medium between Soul and Mind, by damping the strings of moral sense and thus untuning the harp on which the Soul would bring forth those harmonious vibrations, which are to our inward ear the voice of our Creator.

Moral Doubt.

Another instance of the inadequacy of Reason to supply, unaided by the Soul, all the wants of our Moral-Mental Organism, consists in the fact that, where Reason is not supplemented by Moral Sense, there remains a void, a darkness in the human Mind, which may be called *Moral Doubt*. The more Sympathy is suppressed and timid Conscience

kept aloof, the greater becomes the Doubt. But when Reason is in harmony with the Moral Law, so that Conscience and Sympathy regain their sway, there is no place for Doubt in the human Mind, which is then in its normal state of harmony with the Soul (§ 13).

Manifestation of the Soul.

As noted before, the two elements of the Good, viz., Justice, whose agent is Conscience,—and Benevolence, which is represented by Sympathy in the human Mind, constitute in their combination the Moral Law of Nature, and are conceived in the Mind, through the Mind's moral faculties just named, by the inspiration of the Soul.

From this proposition we draw the conclusion, that, through the conception of the Good, the Soul, the active agent of the Spirit of Creation, is manifested in the human Mind (§2).

Christianity.

But this is not all. That condition of progress towards perfection, through Evolution, which we called the Moral-Mental Organism (§1), represents, when developed in the highest degree through the Moral Law of Nature, the physiological condition of the most perfect being this Earth ever beheld in the shape of man. We mean Him who came, by the will of God, to impress on the creatures of the Earth the fact of their being connected, through the Soul, with the Eternal Creator; to foreshadow the future nature of mankind, by throwing light on the goal the Moral Law of Nature is leading to. It might be possible to reach, by induction, the conception of the nature of Christ as such when on Earth. Indeed, if the history of mankind did not already possess this ever living example, the philosophy of Evolution, if consistent in its search for the goal of the development theory, would postulate such a being, as the final link, as the utmost consequence of its conclusions.

The sense of security or certainty which establishes conviction in the mind, when Feeling (forecasting that state of perfection of which Christ is the example) is in harmony with the Moral Law of Nature, is the parent source of that inexplicable peace of mind called Faith, which constitutes the conception of *Christianity*. This conception so completely settles in the mind the equilibrium between Conscience and Sympathy, and regulates its actions in harmony with the Moral Law of Nature, that, in reality, this is "the peace of God which passeth all understanding," forming the most palpable manifestation of the Soul.

The Creator.

From the foregoing propositions, which are connected with our hypothesis regarding Feeling and Intuition (§1), as the manifestation of the Primary Cause or Absolute in the Evolution of the Mental Organism, we draw this final conclusion, based on the broad principles of Evolution in its utmost consequence, viz., that, through the conception of the Good, the Soul is manifested in the human Mind, and that the Moral Law of Nature (which is the Good) is the medium of our communication with our *Creator*, which will carry us safely to our destination, if we sincerely adhere to the Good.

The "Occasions of Stumbling."

There are two sorts of evil, or rather the influence of evil on human destiny is twofold, viz., material or physical evil, which, when properly viewed, gives impulses to the Good by stimulating the moral sense of the well-ordered individual mind, and moral evil, which is depravation of the mind. The one, unforeseen and unavoidable in life, is necessary in the world, for the development of moral sense in man; the other can and must be prevented, for its appearance is not simply a misfortune to

ourselves and others, but baneful to the Good in all its aspects, a woe to man. Hence the originator of evil is cursed, while the evil produced by him is brought under control, through the Moral Law of Nature.* The evil which comes to us from without, the accidental misfortunes which meet us on our way, are calculated, in whatever form they may arrive, to awaken our Conscience and Sympathy, to strengthen the relation between Soul and Mind,—in fact, to bring us nearer to our Creator. But the evil which originates from our own animal nature, which pollutes not only our own mind and makes it unfit to receive and develop the impulses of the Soul, but generates also evil in others, is the evil we pray to be guarded against and from whose temptation we desire to be delivered. "Watch and pray lest ye enter into temptation" is the divine commandment. The purest mind is the one that is nearest to God.†

Influence of the Moral Law of Nature on the general welfare and the material development of Society.

§4. Thus it is that, through the Moral Law of Nature, the ideas of Righteousness are created in the mind of the individual man, and that rules for the guidance of his conduct and for the performance of his duties are laid down. These

* "Woe unto the world because of occasions of stumbling! for it must needs be that the occasions come; but woe to that man through whom the occasion cometh!" ST. MATHEW. XVIII. 7.

† ST. MATTHEW. VI. 13. ST. MARK. XIV. 38. JOSEPH HAVEN. Moral Philosophy, p. 67–86. DR. ADAM FERGUSON. Institutes of Moral Philosophy. IDEM. Principles of Moral and Political Science. RALPH CUDWORTH. Treatise concerning Eternal and Immutable Morality.

"La Vertu a son germe dans l'âme humaine c'est une conséquence de son origine. Particule émanée de la Divinité, elle tend d'elle même à l'initiative du principe de son émanation; ce principe la meut, la pousse et l'inspire. Cette particule détachée de la grande âme, specifiée par son union à tel ou tel corps, est le genie de chaque homme, ce genie le porte au beau, au bon, à la félicité. Sa souveraine félicité consiste à l'écouter; alors on choisit ce qui convient à la nature générale, à Dieu, et l'on rejette ce qui contredit son harmonie, sa loi." ZENON. RITTIEZ. Science des Droits. Loi Morale, p. 321–333.

rules are, in turn, communicated, through the individual man and through family life, to the general community or society, and exercise eventually an influence on its external as well as internal condition, moulding the political as well as the moral conduct of the Nation, as an aggregate of rational human beings.*

But the influence of the Moral Law, as indicated by the ennoblement of the Mind through the action of the Soul, can be traced also outside our moral nature, and, in fact, in all concerns of life in which the human Mind has actually a share, for when the Mind is ennobled, habits and taste and judgment are refined. Hence it is that our ideas and our judgment, when contemplating scenes of Nature or works of Art or Science, are moulded by the inspiration of the Good, when emotions run parallel with intellectual powers. Traces of this fact may be noticed in many productions of the mind within the spheres of Art, Science and Literature.

There are certain objects in Nature and Art, which, so soon as perceived, strike the cultivated mind as beautiful or the reverse. Again, there are certain traits of character and courses of conduct, which, so soon as observed, strike us as morally right or wrong. The ideas of the beautiful and the right are thus awakened in the mind by the perception of the corresponding objects, but they belong to two distinct classes of judgments, viz., *aesthetic* and *moral*.†

This progress in Art and Science, with the consequent refinement of habits and taste, is the outcome of the development of the Physical Truths in the Mind (§5). But although this progress

* SIR JAMES MACKINTOSH. Discourse on the Law of Nature and Nations.

† JOSEPH HAVEN. Mental Phil., page 262.

bears the mark of the inspiration of the Good, and thus shows the connection which exists between Moral and Physical Truths, both of which are intuitions derived from Feeling, it is progress only in the material sphere of civilization; for taste is not more Conscience than Intelligence could be, nor can culture of the mind and refinement of manners constitute Morality (§ 6-7). All that is morally right is also inherently beautiful and true, but the so-called civilization as exhibited by Art and Science, with the consequent refinement of taste and habits, does not always coincide in the history of mankind with a corresponding progress towards the Good. The latter can only be attained through the complete and full effect of the principles of the Moral Law of Nature, when freely working on the individual mind.

The development of Society depends on those moral and material principles of progress, which lead nations gradually, through longer or shorter stages of development, from the original condition of barbarous races to the degree of excellence called civilization. The different types of those stages of moral and intellectual improvement and social and material advancement are exhibited to us by Ethnology in the savage, the semi-barbarous, the less-civilized and civilized tribes, hordes, peoples and nations of the Earth.

From those types we learn what is meant by civilization and how the development of the moral element plays an essential part in the material progress of a nation, by leading it from its original condition, where brute force and narrow-minded egotism dominate all internal as well as external relations, into gradual acknowledgement of the principles of Justice and Humanity, in ac-

cordance with its internal moral progress and the ennoblement of its relations with other nations.*

Moral and Physical Truths.

§ 5.—Primary Truths or First Principles, the consciousness of which is noted in § 2, may be divided into two distinct classes, viz., *Moral Truths* and *Physical Truths;* which classes differ from each other also as regards the modes in which Truth develops in the Mind. As the capabilities of the powers of the Mind often differ in their application, so the development of Primary Truths in individual minds really differs in proportion to the capacity and relative freedom of the Mind.

This variation gives prominence to the differences which mark the process of development in the Mind of Moral and Physical Truths respectively. Moral Truths are less dependent on the physico-mental development of the Mind's functions than Physical Truths, for the development of Moral Truths does not depend upon the degree of cultivation of the different faculties of knowledge, collectively called Intelligence, but upon the measure of purity and soundness possessed by the Mind; that is, upon its moral as well as upon its physical aptitude to receive the intuitions engendered through Feeling. The development of Physical Truths, on the other hand, is independent of any state of purity or perversion of the mind, and of any moral concep-

* "Les Sciences morales parviennent à mieux définer à l'homme sa nature spirituelle, à mieux lui tracer le cercle de ses devoirs, à mieux organiser les institutions..... Admirable effet des grandes associations humaines: la marche incessante de l'homme vers le mieux. Car l'homme ne doit pas être séparé de ses œuvres, et l'experience nous montre que, réuni, comme exige sa nature, en Société avec ses semblables, ses œuvres, ses actes, ses principes, ses lois sont essentiellement perfectible et s'avancent toujours, quoique irrégulièrement, quoique avec ses intervalles de recul ou de perturbations, dans cette voie de la perfectibilité." ORTOLAN. *Règles Intern. et Dipl. de la Mer.* Edit. 1864, Vol. I. page 5.

tion of Conscience and Sympathy, being performed through the power of Reason, which differs in each individual; so that those Truths are more or less discernible in accordance with the degree of development to which these faculties have attained. Hence arises the distinction which is observed between the nature of the development in the human mind of Moral Truths and Physical or Scientific Truths. The former, as principles of Justice, develop, through combination with the other element of the Moral Law of Nature, into those laws of ethics, of human conduct and duty, by which we perceive and follow the Good (§2). The development of Physical Truths, on the other hand, depends on those investigations and statements of the Laws of Nature which constitute Science.

Both Moral and Physical Truths are constituent principles of the Universal Law of Nature which maintains the general order of Creation. Moral Truths form the basis of human responsibility, the law of human conduct and duty, and give certain directions to Reason. But Physical Truths, finding their development in Reason, through inductions founded on experience, and thus brought forward by the strength of reasoning, are dependent on the degree of development to which the individual faculties of knowledge have attained, and seem to have Reason for their source.

The same moral obligations, which in the present generation extend their sway over all mankind, were acknowledged by human Conscience as Moral Truths long before human Intelligence conceived the simplest Physical or Scientific Truth. But the simplest Scientific Truths, with or without the constructions of scientific education, teaching or experience, may be forgotten, or

they may be displaced by the knowledge of other Physical Truths, with their correlative sciences. Nevertheless, the spiritual impulses of Justice and Love, which are in their tender germs already discernible in the spontaneous actions and inclinations of the child, at the first dawn of reason, when yet free from all bias of human training or worldly experience, cannot be effaced from the pure Mind, whose natural inclination, when in a normal state, ever was and is to follow the impulses of the Soul. But as Reason is the reflective power whose office it is to disclose the right and the wrong, as well as the true and the false, the beautiful and the reverse, it is one and the same faculty of our organization through which the synthethic process or induction both of Moral and of Physical Truths takes place. The differences which mark the process of their respective development in the mind are often disregarded, as the same test applies to both, viz., the reliability of our mental faculties and the correctness of their operations. This is what leads the sceptical materialist, who can see nothing beyond his narrow horizon, to deny to human Mind the organism of Feeling with its power of prescient or intuitive conception, which constitutes the medium of communication with the Soul. He banishes all this from Creation, as not being comprehended in his philosophy, which does not admit of any progress of Evolution beyond the Physico-Mental Organism. But the inadequacy of Reason is fully demonstrated by the fact that, although our physico-mental faculties are limited and consequently our rational knowledge which depends upon those faculties, these are by no means the limits of our consciousness; for who does not readily apprehend, without any attempt to defin them, the meaning of the terms truth, ougl

right, conscience, sympathy? Can Reason alone or Logic define them? No more than they can define space and time, or matter and force. But those ideas do not require any analytical definition to be understood, for if we cannot circumscribe them by logical definition, we can surely feel them and be perfectly cognizant, through Feeling, of all the emotions they engender. "Thus, it is for instance," says Joseph Haven, "that we conceive space. It is a positive and necessary form of thought. We cannot but conceive it, but how do we conceive it? It must be either finite or infinite, of course, for these are contradictory alternatives, of which the one or the other must be true. But we cannot positively conceive or represent to ourselves as possible either alternative. We cannot conceive space as bounded finite, a whole beyond which is no further space; this is impossible. Nor on the other hand can we realize in thought the opposite extreme, the infinity of space; for travel as far as we will in thought, we will stop short of the infinite. There are two inconceivable extremes, of which, as contradictory, the one or the other must be true; and between these inconceivable extremes lies the sphere of the conceivable. Thus it is ever and in all the relations of thought. It is the same as to time. As we think all things material to exist in space, so we cannot but think all things, mental as well as material, to exist in time; yet we can neither conceive, on the one hand, the absolute commencement of time, nor yet, on the other, can we conceive it as absolutely without limit or beginning. Thus with causality; for the reason we cannot conceive the absolute commencement of any thing that exists in time, hence, we are compelled to the belief that every event has and must have a cause. It is the result of our inability to think the un-

The Law of the Conditioned.

conditioned. Thus the conceivable lies ever between two incomprehensible extremes. The conceivable is bounded ever by the inconceivable; only the limited, the conditioned, is cogitable. The infinite and absolute lie beyond the bounds of possible thought and knowledge to man, they are unknowable, inconceivable."

This is the Law of the Mind, as taught by Reid and Stewart in Scotland, by Jouffroy and Collard in France, and developed by Sir William Hamilton, who called it the "*Law of the Conditioned.*" It has been worked out to its full consequence by Mr. Herbert Spencer, in his work entitled "First Principles."*

This Law presents to us the Creator as infinite and absolute, as a being in reality incomprehensible to the mind that adores Him. "A God that can be comprehended, says Hamilton, is no God; a Deity understood would be no Deity at all. Canst thou by searching find out God? Canst thou find out the Almighty to perfection?" †

This proves again the inadequacy of Reason to constitute, when left alone and without the help of a higher faculty of intuition, the criterion of human accountability. It indicates also the existence of a moral sense in the human mind, which immediately approves or disapproves without reference to any further consideration of logical utility, and serves as an inspiring agent to Reason, tending to develop in the human mind the element of Righteousness, called Justice. Yet, though the nature and constituent principles of this moral sense of the mind, called Conscience, may be beyond the sphere of logical de-

* HERBERT SPENCER. *First Principles.* Part I. *The Unknowable.* JOSEPH HAVEN. Studies of Phil., p. 34. IDEM. History of Philosophy, p. 395. HAMILTON. Lectures, p. 531.

† HAMILTON'S Lectures on Metaphysics, Vol. I, p. 300–309.

finition, it has real existence, for its infallible hold on the human mind, its dominion over Reason and Intelligence, and its powerful influence on the dealings of mankind, are manifested in all periods of human life, in all states of intellectual development and in all stages of civilization.

And this is likewise the case with regard to the other moral sense, viz. Sympathy, which imparts to the human mind the element of Righteousness called Benevolence.

Conscience.

§6. Human Conscience is timid and speaks tenderly to Reason, while dazzling Imagination overpowers it. Hence Conscience appears a coward when it has to wrestle in the mind with malignant passions or with shrewd Selfishness, operating under the disguise of "general utility" or "reason of State," and shrinks alike from the burning fury of the one as from the other's cold grip of treacherous arguments, which, owing to the false colors hoisted, are often mistaken for commonsense;—and yet, this timid Conscience, though bullied out of countenance for the moment, is the agent of immortal truth, for the power of remorse, the strength of an accusing conscience, can never be overawed by passions nor lulled into inactivity by reasoning. Can Conscience err? Conscience is the connecting link of Justice between the Soul and the Mind, and, as such, the messenger of truth, but its promptings are perceived through the faculties of the mind, and human mind is not and cannot be infallible. The reasoning power as well as the judgment may fail. This is the consequence of the frailty of the human organization, with which the faculties of the mind keep equal pace; but this does not and cannot dispense a rational man,

endowed with a sound mind, from the moral obligation (when not prevented by forces beyond the control of free will) to act as he sincerely believes to be right, that is, to follow the dictates of his Conscience, which will not mislead when listened to with sincerity, which is purity of mind free from any bias of interest and emotions. But when Conscience casts its light on an impure mind, depraved by rapacious selfishness or moved by angry passions, its image is distorted like the gentle moon reflected in stormy waters; yet, the voice of this faithful messenger of eternal truth keeps ever sounding in our moral ear, until fully acknowledged, though alas often too late, which is the cause of all human misery.

At the most solemn period of human history the question was asked: What is Truth? But, as we perceive the true nature and power of moral truth when we are ourselves the actors and the decision of Conscience concerns our own good or evil deeds, thus the heathen philosopher, who put that question, gave the answer himself through an effort to appease his accusing conscience, which effort is indicated by his formally washing off his hands the guilt of innocent blood. *

The Law of Conscience.

§ 7. From the Soul, which is the originator of the principles of Good in the human mind, and which distinguishes the intuitively rational man from the brute acting by instinct, proceeds,—through the Moral Sense of Conscience, as noted in § 2,—the intuition which awakens in our mind certain elementary ideas of reason and impulses,

* "A good conscience, it has been said, is the only object of universal desire, since even bad men wish, though in vain, for the happiness which it confers. It would be more correct to say that an accusing conscience is an object of universal dread. But in either case, whether for approval or condemnation, very great is its power over the human mind." JOSEPH HAVEN. Mental Philosophy. Rational Emotions, p. 436.

whereby the mind retains its impressions in the form of necessary and immutable obligations, which come so natural to our reason, that not to follow them seems contrary to our nature and thus wrong, while to obey them, seems natural and right. The fact is, we are then complying with our conscience and thus constituting the innate criterion, by which our judgment pronounces the spontaneous verdict of right and wrong,—the ought or ought not of moral obligation, as impressed on our minds by Conscience. This takes place, through the same natural judgment by which we perceive the distinction between simple truth and direct falsehood or between two contradictory propositions, whenever the voluntary act of any responsible rational being,—in our own case or in that of others, and irrespective of the question whether it be an act already performed or one only proposed, or designed,—is made an object of contemplation. The verdict, which is always in harmony with Reason, is the expression of approval or disapproval pronounced on the part of Conscience with reference to the act contemplated.

This harmony of Conscience and Reason, the test of right judgment, is the *Law of Conscience*, the manifestation of the Law of right and wrong,—the immutable natural justice, universal and inevitable as the Moral Law of Nature, whose essential element it is (§ 2). *

* SIR WILLIAM HAMILTON. *Lectures on Metaphysics and Logic.* Edit. 1861, Vol. I, p. 300-389; Vol. II, p. 519. JOSEPH HAVEN. *Mental Phil.* p. 314-326 & 561. Idem *Moral Phil.* p. 67. CH. VERGÉ. Le Droit d. G. avant et depuis 1789. Introd. Dr. d. G. de *G. F. Martens.* WOOLSEY *Internat. Law*, § 1. Sir JAMES MACKINTOSH. *Disc. on the Law of Nature and Nations.* HALLECK. *Internat. Law* (Edit. Sir SHERSTON BAKER), ch. II, §§ 13 & 18. VICTOR COUSIN. *Course de l'Histoire de la Philos. Moderne*, (Edit, 1846), Vol. I, p. 307-322. BARTHELEMY ST. HILAIRE, Mémoire sur la Science Sociale, La Loi Morale etc., Séance et Travaux de l'Academie des Sciences Morales et Politiques. Tome XXXIII, p. 200. PHILLIMORE. *Comment. Internat. Law.* Vol. I, Part I, ch. III.

Craving after rules for international conduct.

§ 8. He who denies the existence of a Moral Law of Nature, of that Law of our Moral-Mental Organism, which constitutes the highest stage of Creation on Earth reserved to Mankind (§ 1), cannot believe in a standard of Justice and Benevolence, and must make good and evil dependent upon ever varying conditions; for there cannot be any standard of the Good without the correlative conception of a condition forming part of the Universal Law of Nature, that is, that Law of the Good, which we called the Moral Law of Nature.

But, furthermore, this inspiration of the Soul, this longing toward the Good, as the natural consequence of our Moral-Mental Organism, is corroborated by History in all its stages, and is most conspicuous in the process of development of Societies or States, in Europe as elsewhere. This is a plain indication of the influence which the Moral Law has on the growth of civilization, and which is exhibited by the general craving after some positive rules of conduct calculated to bring the principles of this Law, which in the inwardly conscientious man is universally felt to exist, into practical or visible shape, for the regulation of the mutual rights and obligations of men, and for the peaceful intercourse between nations.

Mr. Hall, in his recent great work, gives the following historical account of the way in which the conception of International Law arose. The state of things which presented itself in Europe, for a considerable time before International Law came into existence, is described by him as follows:—

1. "Such material restraint as was supplied at an earlier period over the greater part of civilized Europe by the feudal relations, and over much

of it by the superiority of the Empire, had disappeared, and such moderating influences as had been exercised by the Church had also disappeared, influences, in other words, which, whatever their material power, had at one time deeply affected the imagination, had died away."

2. "No means existed of setting up any authority of a like external nature, competent to maintain international order; and no habit of reference to a formulated moral standard, independently of external authority, had grown up."

3. "Rules of conduct were becoming daily more necessary, through the increasing intercourse between both States themselves and the subjects of States, and through the wider area over which the relations of States were continually spreading."

"Under such circumstances it was natural, that a craving should be felt for the discovery of a rule of international conduct, capable of impressing itself on the Mind with something of the force of Law. That such a craving was generally felt, there are many indications, and, in fact, without its existence as a powerful motive among the European peoples at large, international law could obviously not have obtained recognition. The only distinct attempts to satisfy it were however made by legal writers; and it was by them, as the medium through which the ideas found expression which were latent in the general mind, that International Law was placed upon its original speculative basis. To understand how that basis came to be adopted, therefore, it is only necessary to examine the works of the writers by whom the advent of Law was prepared." *

* W. E. HALL. *International Law.* Edit. 1880, page 657.

Cause of that craving.

§ 9.—What, then, was the cause of this general craving, of this universal and urgent demand for law? Of course, there was a general sense of the necessity of establishing some rules of conduct between nations and men, who, being freed from material restraint and blind obedience, were, with their degenerated consciences, cast adrift in a sea of boundless doubts as to what was right or wrong in their mutual dealings, until brought to the sense of Justice by the regenerating, self-acting power of the free Moral Law of Nature. The latter is the source of the sense of Justice, that powerful motive, which gave birth to the ideas, which were latent in the popular Conscience but found expression through the leading minds of the time, by men like Franciscus à Vitoria, Covarruvias, Soto, Saurez, Melanchthon, Olendorp, Hemming, Albericus Gentilis. Their arguments were finally summed up conclusively by Hugo Grotius before the grand jury of civilized humanity, and the verdict was thereupon given which saved modern civilization from drifting back into the chaos of the dark ages of European barbarism.

Grotius.

Hugo de Groot, more generally known as Grotius, the acknowledged founder of the science of International Law, the blessed reformer who stemmed the current of moral corruption caused by the policy of dissimulation, injustice and crime, as taught by Machiavelli and his school in that dark period of European Society, in which criminal frauds and treacherous artifices made up the policy called Reasons of State, maintained, in his famous work, "The Laws of War and Peace," *

* DE JURE BELLI AC PACIS, of which the last Latin edition, corrected by the Author, appeared at Amsterdams in 1642, has been repeatedly translated. The best French translation is that of Mr. *Pradier Fodéré*, published in 1867.

the existence of a fixed standard of right, and thus of a real distinction between right and wrong. He also taught that the rule of conduct imposed by our Conscience, which enjoins certain actions while it condemns others, a rule which is indispensable for the maintainance of any society of rational human beings, constitutes the Law of Nature (*Jus Naturale*).*

The Popular Conscience.

§10. This craving after Justice, which has been defined as "a constant and perpetual disposition to render every man his due," is the result of the working of the Moral Law of Nature in the individual minds of the thinking and leading members of Society, by which process, and more or less perfect, in conformity with the degree of susceptibility possessed by those minds regarding the influence of the Moral Law, the *Popular Conscience* is formed.

Scarcely two individual members of any Society will be found to think exactly alike or to have the same perception of what is right or wrong, for it is seldom that individual minds are in the same condition of soundness and purity which would enable them to develop the intuitions of the Soul into identical conclusions, though, as regards the main principles, many leading minds of the Society may agree, and form on this agreement a common conclusion.

The National Spirit of Law.

§11. This common conclusion, the outcome of the principles on which all agree, is the manifestation of the Popular Conscience, which is then applied as a standard of measure or ultimate test of the laws of that Society or, in other words, as its law-giver, to teach its Jurisprudence or to explain the facts of History, and it is then called the *Spirit of Law*.

*De JURE BELLI ac PACIS. Lib. I. Cap. I, §10.

This Popular Conscience or Spirit of Law, being the reflex of the progress made on the road to civilization by the respective Society, Nation or State,—for which reason it is also called the *National Spirit of Law*,—must naturally change its aspect with every stage on this road, made by the subject whose immanent phenomenon it is, *i.e.*, by the collective leading minds of the respective Nation. In the same proportion as civilization progresses, the Spirit of Law approaches in a rising scale towards the standard of the Good, but likewise any retrogression in that respect caused by any disturbance of the harmony of the Moral Law within the individual mind, must have a depressing effect on that scale.

The Spirit of Law having given birth to the usages of Society, these, gradually developing, become, through the expressed or tacit sanction of the faculty invested with sovereign power in the Society, consolidated into Positive Law, for the government of that Society as Body-Politic and for the definition of the reciprocal relations between individual members and between these and the sovereign power of the Society or State formed by them. Thus the Spirit of Law of every State and every period manifests itself through the *Law* (*Jus*, *Droit*, *Recht*) with which it correlatively changes on the road to civilization, according to the fixed rules of the Moral Law of Nature, which are beyond the caprices of the day (§1). Every era in the history of a Nation has its own Spirit of Law and its correlative usages and Positive Law. In consequence thereof, the Positive Law of each individual State differs from that of another State, in proportion to its respective condition, history, tradition, morals, climate, nature of the soil and other inherent natural circumstances. It is not possible to make,

a priori, one set of laws suitable for all nations, unless every individual mind had the same moral capability; nor can this be the province of the Moral Law of Nature, which, as the Law of the Moral-Mental Organism (§1), is evolved,—like all Laws of Nature,—by spontaneous gradual development. This gradual moral development of Societies of human beings operates through the practical medium which we have noted in the Spirit of Law and which explains itself to the Popular Mind through *Common Sense*.

Common Sense.

§ 12. Common Sense is that plain, practical logic, suitable to common intelligence, as formed by the actual composition of the human mind, under the influence of the Moral Law of Nature, of which it is the logic and, as such, the language of Conscience and Sympathy combined, by the harmony of which its arguments are proved. As such it is the only sure foundation for the loftiest structures of human thought, the safe holding ground for the anchor of a sound mind, which, losing this, is cast adrift among the cliffs of inextricable doubts and destruction. It is the only logic comprehensible to Popular Conscience, as it speaks to Feeling as well as to Reason, of which two elements, combined, the Popular Understanding is formed. Where the mechanism of Reason is inadequate, there Feeling (which is the impulse of the Soul) supplies the want. Hence it is that the human mind is able to feel as well as it can reason, and its Common Sense partakes of both (§1).

If we cultivated our Feelings as we cultivate our Intellect, they would be in better harmony with each other, and our Common Sense would be good and complete; while now, in many cases, it is only half the faculty it should be. This

makes man the more one-sided, selfish, cruel and stupid, the more he learns, and at last, it causes his mind to give way, through its not being properly balanced by those two inseparable elements of our Moral-Mental Organism, Reason and Feeling. Such is Common Sense, which, as the natural test of logics, is impartial, though not neutral, and takes over sound ideas from all systems indiscriminately, without sanctioning or criticizing any special doctrine, because it follows a course of its own. Only that which comes deliberately in its way is utterly abolished, for it is the Popular Understanding, forming the Spirit of Thought of the living generation, which is now on the highroad to civilization, as the Popular Conscience forms the Spirit of Law of that generation. When the Moral Law of Nature is applied to common life, Common Sense is the logic by which its influence is explained, to test the practicability of its rules in the actual circumstances of social life, and to co-ordinate the facts of Social Science, as it is through Common Sense that the isolated facts of history are brought into a comprehensive whole. Here we have an explanation of the influence which this Law of Nature exercises on the progressive Social Evolution of the human race.

The Empirical School.

§ 13.—The pure dogmatism of the old Scholastic philosophy is not stranger to Common Sense than the Positive Empirical. Both fail to keep a firm hold on the free popular mind. The one might influence the human imagination and thus captivate Reason for a while, and the other might fascinate the masses, by the false lore of a material liberty which is without spiritual freedom, or charm the Imagination of unthinking youth into loyalty to the Empire of Reason, the

promised land of an animal materialism free from all moral restraints, where the Mind stops short of the highest development allotted to it in creation. But neither the one nor the other can make man believe without thinking or make him think without feeling. If the one can make believers without faith, it cannot make non-thinkers void of Reason, and if the other might succeed, through the attraction of a delusive simplicity of shallow arguments, under the disguise of Common Sense, to form inexperienced minds, wanting in self-organisation or purity, into sensuous unbelievers, it cannot complete its task by bringing the ever-living inspiration of the unbiassed human mind under the positive mode of thought of Empirical Philosophy. The tyrannical shackles of all one-sided, narrow and exclusive philosophies will be cast off by the self-seeking and self-determining human Mind, when left free to follow its own inspirations, to regain its natural course of thought in Common Sense, to satisfy the convictions of Reason and the longings of Feeling.

The International Spirit of Law.

§ 14.—In conformity with the Popular Conscience, an *International Spirit of Law* is generated by the relations which naturally must spring up between individual States. This Spirit of Law displays the influence which it exercises on the external life and voluntary acts of Nations towards Nations, by producing those usages, which form the basis of what is called the *Law of Nations* or *International Law*.

These usages of Nations cannot be formed into Written or Positive Law, for the reason that there is no Body-Politic, endowed with legislative and executive power and having for its constituents Nations or States. They have, however, inherent binding force, because International usages are, when generally acknow-

ledged, a reflex of the best part of the various Positive Laws, that is to say of those parts which bear more conspicuously the mark of the influence of the Moral Law; for these usages must satisfy the Popular Conscience, in the case of each Nation or State. The only common standard of Popular Conscience, as it appears in the various Nation or States, is the Moral Law of Nature. In this all agree. But starting from this common standard, the Popular Conscience of each Nation or State is differentiated by the varying progress of civilization, at every period in the history of Nations. The indicator of these variations is the International Spirit of Law of each successive period, which, in harmony with the changes in the sentiments and external conditions of individual nations, is the reflex of the moral development of the international life of the body of States. These subtile elements of Law form the common source from which International Law, this brightest part of the History of Nations, flows forth. "Bright effluence of bright essence increate!"

Thus it is that International Law, not being capable of being put into the form of Positive Law by any worldly authority, depends for its support entirely on the spontaneous development of civilization, as engendered by the human Mind, through the ennobling impulses of the Soul. Under this influence International Law has been gradually modified, in conformity with the progress of civilization. Instances of this process of modification are: laws enhancing respect of alien life, rights and property; laws and treaties regarding slavery and slavetrade; the definition of rights of nationality and domiciliation; the protection of exiles; the extradition of criminals; liberty of conscience; security of

intellectual property; liberty for the navigation of the seas; neutrality; the laws of war, and so forth. These are so many instances of international moral progress which is ever going on; for "the life of Nations," says Savigny, "can be compared to the human life, which is never stationary, but represents a continuous succession of organical development."*

From this development has resulted the code which treats the rights and duties of Nations. It is not a written code, indeed, but one which does not the less subsist, as an effect of the collective working of the Popular Conscience, operative in Civilized Nations at all stages of the history of Mankind. It is founded on the mutual consent, tacit, expressed or presumed, of all civilized nations.

"*Cette loi*," says Hefter, "*se rétrécit ou s'élargit avec le degré de culture des nations. Reposant d'abord sur une nécessité ou sur des besoins purement matériels, elle emprunte, dans ses développements, à la morale, son autorité et son utilité, et s'affranchit successivement de ses éléments impurs.*" We have but to add, that we cannot fail to acknowledge how clearly the effect of the Moral Law of Nature is exhibited in this development, through the International Spirit of Law.†

The Philosophy of Law and the Historical School.

§15. By this development of the moral principles (§5), the intuition of the Soul is combined with the actions of the Mind and shows the re-

* VON SAVIGNY. *System des Rom. Rechts*, vol. I, ch. II, §7. "The duties of men, of subjects, of princes, of lawgivers, of magistrates and of states are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connection. The principle of Justice, deeply rooted in the nature and interest of man, pervades the whole system and is discoverable in every part of it, even to its minutest ramification, in a legal formality or in the construction of an article in a treaty." SIR J. MACKINTOSH. *Discourse on the Law of Nature and Nations.*

† HEFFTER. Le Droit Intern. de l'Europe. Edit. *Bergson*, §2.

lation in which the Soul, as original motive power, stands to Reason in the human Mind, and thus to the motives of our actions. This may furnish the clue to the fountain-source of many causes, which are only discernible in their effects, but remain unexplained by the mute facts of History. When we attribute to this motive power the relation we feel *must* exist between these effects and the fountain-source of their causes, between the phenomenon and its inherent factor, or, to comprehend all in well-known terms, between historical and philosophical data, we should surely not expect to satisfy Empirical Science; but neither are we sinning against any of its demonstrations, by attributing this onward strife of Society, this incessant progressive evolution of civilization, which plainly shows an inherent action of the human Mind, to the influence of the Soul, for the Moral Law of Nature, the Law of the Good, is also the Law of Society. This cannot be otherwise, for the Moral Law of Nature consists not only in the dictates of Justice, but is the perfect harmony of both elements of Righteousness, as imparted to our Nature; of which Justice, as expressed by the Law of Conscience, is but one element, the other being Benevolence, which, as we have noted before (§2), takes into account the frailty of human nature, tempering the stern sense of Justice in proportion to the actual tottering pace of Society, and promoting its gradual development and the sure progress of the human race towards the Good, for virtue without charity does not exist.*

The omission of taking into account this mitigating element of the Moral Law of Nature,

* "Though I speak with the tongues of men and of angels and have not charity, I am become as sounding brass or a tinkling cymbal." *St. Paul. I Cor. XIII. 1.*

which makes Justice applicable to the natural state of human Society, so that, of the two elements forming the Popular Conscience, called the Spirit of Law, one always qualifies the other, or in other words, the mistaking of the fluctuating Spirit of Law for the immutable Moral Law, seems to be the cause of the difference which exists between the Philosophy of Law and the Historical School.

When contemplating history in the different aspects of that social evolution, which civilization has undergone through the working of the Soul on the individual mind and which is exhibited in the written laws of the different epochs of civilization, we may well exclaim with a recent writer of the Historical School, "*l'évolution progressive du Droit n'a jamais subi de temps d'arrêt et depuis sa première manifestation inconsciente sortie de l'instinct populaire, jusqu'a son riche épanouissement fécondé par les travaux des savants, le droit s'est développé comme la vie même, comme une force inhérente à l'humanité.*"

"*Et quel spectacle grandiose que d'assister ainsi à la formation lente du Droit, de le voir émerger du travail latent de la conscience populaire, surgissant pour répondre aux nécessités sociales et constituant peu à peu l'individualité nationale.*"*

This is the action of the Popular Conscience, which, as Spirit of Law, is permanently at work in conformity with the Law of Conscience, to find the minimum of individual sacrifice which would produce the maximum of public welfare. It is the combined effect in the human mind of both elements of the Moral Law of Nature, the perfect harmony of which constitutes the Good.

* "*La Philosophie du Droit et l'Ecole Historique.*" Leçon d'ouverture du cours de Droit Naturel, par Mr. ADOLPHE PRINS, Professeur à l'Université de Bruxelles. *Révue de Droit International. Tome XIV.* 1882. *No.* 6, *p.* 565.

But when this harmony is broken, the cheerful prospect is converted into the mournful contemplation of a retreat on the road to civilization, for then the moral combination and strength of the individual mind is broken, and, the mind gradually becoming distorted and polluted by passions, by prejudices or selfish motives, personal morality is impaired. Where this is the case as regards the leading faculty of a Nation, there the national standard of morals is degenerating, civilization is coming to a standstill and civil liberty and national prosperity decline. When the moral principles of a Nation are corrupt, its international conduct becomes untrustworthy and vile, and the Nation, having sinned against itself, is ready for any act of injustice towards its neighbours and in spite of any temporary aggrandisement, effected through violation of the principles of justice and humanity towards its weaker neighbours, the decay of the unsound State is irrevocably decreed by the Moral Law of Nature, as proved by all recorded facts of History. *

Thus the Moral Law of Nature, which has its agent in the *Popular Conscience* and its Logic in *Common Sense*, manifests its influence, not merely as regards the individual progress of the Nation or State, but also in the dealings of Nation with Nation; for it represents in the human Mind the elements of the law as laid down in the divine commandment, "Do unto others as thou wishest to be done unto thyself," which is the only true principle of utility, and the loyal rule for the combination of self-interest with general welfare.

* RITTIEZ. *Science des Droits, Causes de desordre, Faits Politiques*, p. 290–293.
VICTOR COUSIN. *Philosophie Moderne*. 1846. "*Du bien et du mal moral*." Vol. I, p. 337–343.
ORTOLAN. *Regl. Intern. et Diplomatie de la Mer*. Edit. 1864. Vol. I, p. 63.

CHAPTER III.

INTERNATIONAL LAW AND ITS JURISPRUDENCE.

Origin of States. Natural and Political Nationality.

§16. Social life is, as stated at the beginning, the natural consequence of the human organism, for man does not exist in an isolated state, as long as natural causes have free play. By virtue of the intellectual faculties and the sensibility of his mind, man is essentially a social being, and he is always bound to be so, whatever may be the nature of his associations, which vary in conformity with the special circumstances affecting his development and modify the degree of civilization to which he actually attains.

This is the natural origin of societies or aggregates of human beings, which are called *Nations* or *States*, the reciprocal moral and material or political relations of which form part of the subject matter of International Law, as will be explained hereafter.

Groups of the same race, identical in origin, and having common usages, languages, or idioms, and common moral aptitudes, are called *Peoples* or *Nations*, when designated from a natural historical or philological point of view, and constitute the *Ethnographical* or *Natural Nationality*.

When political individuality is ascribed to a people, as subject to Law, it is called a *State*; which designation refers to the people as Body-politic, possessing a common government, common laws, common internal and external powers, civil and political, and common interests, in all matters affecting the *Political Nationality*.

Different Nations can, by their common consent, be united into one State; in which case all

the individuals composing the State have the same political nationality, though they may differ greatly from an ethnographical point of view.

A nation can also be divided into several States with as many different political nationalities; and different States may form a Union of States, in which all the individuals composing these States have one and the same political nationality defined by the Union.

Conditions for the Political Individuality of States as Persons of International Law.

For the recognition of a State as such, that is, as a community having political individuality, certain conditions are indispensable. These are that the community, claiming recognition as a State and all the rights and duties attached to such a status viewed from the stand-point of International Law, must be an organised Body-politic, which should consist of individuals who do not belong or owe allegiance to any other State, and which should not be incorporated by virtue of any outside authority, concession, grant or charter, but definitively established on its own defined territory with its own government and legislation, possessing also the means and ability to maintain its integrity.

Without these conditions, the fulfilment of which constitutes the State as a member of the family of States, whose mutual relations form the subject of International Law, no society or aggregate of human beings can be denominated a State or admitted on equal terms to international relationship with existing States.

Thus, for instance, chartered Trading or Colonization Companies, though having their own government and administration, and uncontrolled management of their affairs on their own extended territorial property, cannot have international relation with any foreign Government

except through the Government from which their charter emanates, and under whose protection they are established or to which they owe allegiance. *

Nomadic tribes, living in wandering groups without a permanent or defined territory, though they be closely united and organized for their internal government, cannot be regarded as States, because they fail to fulfill all the conditions above mentioned. They may, however, in some cases, be admitted to the privileges of International Law and hold intercourse with civilized States, whenever such tribes are ready to reciprocate international privileges, according to their ability or as far as their condition will permit. As a general rule, when privileges of International Law are extended to uncivilized nations, this is done, at the prompting of humanitarian views, without requiring reciprocity on their side, unless as one of the methods made use of to gain them over to civilization.

Associations of pirates and other outlaws, though not belonging to any nationality nor owing allegiance to any State, are disqualified to form States, as having themselves no right of existence. †

"The marks of an independent State," says Mr. Hall, "are that the community, constituting it, is permanently established for a political end, that it possesses a defined territory and that it is independent of external control. It is postulated of those independent States which are dealt with by International Law, that they have a moral nature identical with that of indi-

* PHILLIMORE. *Comm. on Intern. Law.* Vol. I. Ed. 1879, p. 199. HEFFTER. Europ. Volks-Recht, §13–20. WHEATON. *Elem. Intern. Law.* Edit. *Dana*, §5. DE MARTENS. L. VIII., §§ 260 et seq.

† PHILLIMORE. Comm. on Intern. Law, Vol. I. Edit. 1879. CALVO. *Le Droit Intern.* Vol. I. 1870. Liv. II, p. 117.

viduals, and that, with respect to one another, they are in the same relation as that in which individuals stand to each other who are subject to Law. They are collective persons and as such they have certain rights and are under certain obligations." *

The investigation and systematical arrangement of the rights and obligations of States, with their various practical modifications, form the subject-matter of this Manual. For the clear understanding of the various aspects and combinations of these rights and obligations, however, it was deemed indispensable to trace them up to their sources, that is to the law by which the Moral Nature of States is governed, and which forms the basis of their rights and obligations. This was done in the foregoing chapters.

We will now proceed to investigate the practical application of those rights and obligations in the case of the Society of States, where they form the basis of International Law.

Rights and Obligations of States.

§17. In the work above cited, Mr. Hall says further, "the capacity in a corporate person (State) to be subject to Law evidently depends upon the existence of a sense of right and a sense of obligation to act in obedience to it, either on the part of the community at large or, at least, of the man or body of men in whom the will governing the acts of the community resides." † The cause which produces this sense of obligation, to act in conformity with Law as existing in the leading minds of those governing States, having been investigated in the preceding chapters, we will now endeavour to describe the Law which practically governs the rights of States, and their obligations to act in obedience to that Law.

* W. E. HALL. *Intern. Law.* Edit. 1880, §1.

† IDEM. *Intern. Law*, page 14.

Considering that social life is the natural consequence of the human organism and, as such, subject to development in conformity with the Law of Nature governing that organism (§1), it is but natural that States, which are the outcome of social life, have, in their collective capacity as aggregates of moral beings, the same moral obligations assigned to them as man, but with a vaster and completer sphere of action and, consequently, with some special prerogatives and rights (§18).

The duties of a civilized State are of two sorts.

1°. In the first instance, those duties which constitute the *raison d'être* of a State and are essential to its existence, consist in the obligations which arise between the Government and the individual subjects or citizens *(Staatsangehörige)* in all matters pertaining to public order and to the moral and material progress of the nation. These are the internal relations of the State, which may be varied or modified without contact with the internal or external attributes of any other State.

2°. But, in the second instance, in order to be able to fulfil its internal duties undisturbed, and to its full extent, the State must enjoy the outward security and respect essential for the free exercise of its full faculties and all its attributes, as a Body-Politic. This necessarily imposes on the individual State the duty of intercourse with other States, in order to establish its rights, which, with regard to their external relations, are called *International Rights*.

These International Rights are enumerated as follows.

1°. The right of existence; from which devolve the rights of self-preservation and of self-defence, with the accessory rights of redress, retortion

reprisal, seizure, interference, and that of making war and concluding peace.

2°. The rights of sovereignty, independence, equality and respect.

3°. The right of property.

4°. The right of legislation.

5°. The right of intercourse and international commerce.

6°. The right of legation, negociation and treaty.

7°. The right of neutrality.

The principle features of these rights and their correlative obligations, which constitute the different objects of what is termed International Law, are separately sketched in the succeeding parts of this work.

In the case of all well organised civilized States, their rights and corresponding obligations are respectively of the same nature. Owing to this similarity of attributes and interests, international rights and duties must devolve upon every State, as a natural obligation to respect the rights of every other State, and thus to maintain its own security for the proper fulfilment of its internal obligations.

A State which refutes all international intercourse, places itself outside the pale of the Law of Nations and has in consequence no guarantee for its safety.*

International Morality.

From this it appears obvious that the interests and duties of States are identical, and that the mutual interests of civilized States are so interwoven, that each, by the due performance of its own duty, promotes the welfare of all. Again,

* Thus China and Japan, and recently Corea, after centuries of seclusion and exclusion of foreigners, entered into the family of Nations to secure their own interests.

it is obvious that the substitution of might for right brings misery not only on the oppressed but also on the oppressor.

Plato observed that the just State differs in nothing from the just man, and Hugo Grotius maintained that the ethical principle should underlie all transactions between nations as well as those between individuals.

The rights and duties of Nation towards Nation, the origin of which loses itself in the mist of ages, when mankind began to form itself into Societies, became more and more discernible when these different Societies, through having intercourse with each other, found it necessary for mutual safety and for their own individual benefit to abide by certain rules, tacitly or expressedly consented to.

In the same proportion as Nations advance in civilization, their rules of conduct towards each other are gradually brought into conformity with the principles of justice and morality, and find henceforth support not alone by material considerations and purely selfish motives of mutual preservation, but also by the awakened Human Conscience, which, when developed into National or Popular Conscience, tends more and more towards the practical observance of the Moral Laws of Nature. This takes place not only in the case of States of equal strength and pretensions, but, indiscriminately, among all the members of the great commonwealth of Nations.

This constitutes what is termed *International Morality*, which is the principal agent in the forming of the International Spirit of Law (§14).

§18. We find that civilized States, in their mutual intercourse, in times of peace as well as in times of war, invariably appeal to Public

Opinion for the justification of their acts. This may be done sometimes in the manner in which Pilate appeased his conscience, but, however that may be, it is a plain acknowledgment that *Justice* is expected to be observed in the intercourse of States, in the Society of Societies, as it is a constituent element of Society itself.

The civilized Nations of all ages recognized the Moral Law as binding upon themselves in their internal relations. There are historical facts which indicate that the observance of the principles of this law, in external as well as internal relations (however imperfectly realized) were not unknown to Greece and Rome, the oldest of civilized Nations on whose institutions modern European Laws are modelled. Cicero, in his great work on the commonwealth, maintains "that God has given to all men conscience and intellect and that, where these exist, a law exists of which all men are common subjects," and Plato repudiates the idea that any Society could flourish which did not respect the rights of other Societies. *

A State must be regarded with respect to its rights and duties, and to the consequences of its relations with other Bodies-politic, from two different points of view, viz., *de jure* and *de facto*. On the one hand, a State must be regarded as a

* PHILLIMORE. Common Internat. Law. Vol. I. Edit. 1879. Chap. 3, §§ 17-27.

The same rules of morality, which hold together men and families and which form families into commonwealths, also link together these commonwealths, as members of the great Society of mankind. Commonwealths, as well as private men, are liable to injury and capable of benefit from each other; it is therefore their interest as well as their duty, to reverence, to practise and to enforce those rules of justice, which control and restrain injury, which regulate and augment benefit, which, even in their present imperfect observance, preserve civilized States in a tolerable condition of security from wrong and which, if they could be generally obeyed, would establish and permanently maintain the wellbeing of the universal commonwealths of the human race. Sir JAS. MACKINTOSH. *Discourse on the Law of Nature and Nations.*

moral person, as being an aggregate of self-conscious agents, if we are to comprehend the standard principles of its moral obligations. On the other hand, it is necessary, in order to avoid ambiguity in our conclusions, to bear in mind the difference which *de facto* exists in the nature of the respective rights and duties of these two subjects of the Moral Law, viz., the individual man in his social relation to his fellow-creatures and the societies of moral beings, called States, in their present mutual conditions; from which it results, that certain prerogatives and exceptional rights are attributed to States which could not be possessed by individuals.

Reason therefore, which is the exponent of Conscience, through Common Sense, and as such a distinct source of International Law, guides the application of the principles of the Moral Law of Nature to the rights and duties of States, by following the International Spirit of Law, (§§ 4 and 14). *

International Law, International Jurisprudence, Diplomacy.

§19. As we have seen in the preceding paragraphs, the nature, necessities and interest of States give rise to international concerns, which establish international claims or rights with their corresponding duties and obligations; hence comes International Law. There exists, however, in the great Society of States no legislative power and therefore no written code of International Law, but there exist more or less generally acknowledged rules of reciprocity of conduct, in peace and war. Such rules have been sanctioned, either by written agreements concluded between

* PHILLIMORE. Vol. I. 1879. Preface, page VII, and Chap. IV, page 30. Vol. III. 1873, page 878. G. F. DE MARTENS. Précis du Droit des Gens. Edit. 1858. Note of Ch. Vergé, §4, page 41. KLUBER, Droit des Gens Moderne de l'Europe. Edit. Ott. 1861, §37, page 58. VATTEL. Edit. Pradier Fodéré. 1863. Preface of Vattel, page 47, and Prelim. §6.

sovereign States, and called Treaties or Conventions, and forming the *Conventional Law*, which has direct binding force for the States under contract and serves as precedent in many cases, or they have been sanctioned by custom or usage of long standing among Nations, voluntarily admitted as the *Customary Law*. These two elements constitute what may be called the *Positive Law of Nations*. But as this Law, hedged in by the narrow limits of special and isolated conventions and tacitly admitted customs, could not supply all the wants of international intercourse, in the manifold conditions of peace and war, it is supplemented by a third element. This may be called the *Necessary Law of Nations*, and serves for all those cases for which no provision is made, either by treaty or custom. This third element, necessary to complete, through International Jurisprudence (§20), the rules, essential for the intercourse of civilized nations, necessary to cement the loose stones of the Positive Law of Nations, composed of customs and conventions and stray facts of historical precedents, into the solid international structure that constitutes the stronghold of social progress and civilization, is the *Law of Conscience* which is the law of *Justice*. (§7). *

These three legal elements, viz., the Written Law, Customs and Justice, form, in their conbination, what is called INTERNATIONAL LAW (*jus inter gentes*).

What constitutes the science called *International Jurisprudence* (§20) is the knowledge and application of the Conventional and the Customary Laws of Nations, in all conditions of international intercourse, in peace and war, sup-

* VATTEL. Droit des Gens. Prelim. §§ 6–9. G. F. DE MARTENS. Précis du Droit des Gens. Edit. 1858. Note of Ch. Vergé, §4, p. 41.

plemented and commented upon, in conformity with the precepts of the Natural Moral Law, that is, according to Justice founded on Common Sense, by the authority and impartial judgment of able and experienced writers.

The Juris-consultus of International Law, when accredited by the Government of his State, through special diploma or letter of credit, as their agent in the intercourse with another State, is called a *Diplomatist* and his profession as such *Diplomacy*, which is the art of conducting international affairs to satisfactory results.

International Legislation supplied by International Jurisprudence.

§20. International Legislation is not possible, for want of a general International pact or covenant, based on the constitutional principle that the individual interest of each State should be subordinate to the general interest of the community of Nations. However, this absence of an International *Jus Statutarium* did not prevent the development, *de facto*, of International Rules. These rules actually constitute Law (*jus*) by virtue of the purity of their origin, by the advantages accruing from their existence to the moral progress of Societies, which are the important subjects, and by the immensity of the interests involved in moral intercourse between all human beings.

Laws (*leges*) enacted by legislation, are necessary to indicate and to secure, by sanctions and penalties, the performance of what is right. But laws could not create moral obligations which did not previously exist in the human conscience. Where there are no laws, there it is still our duty to do what is right. *

It is obvious that the want of International Legislation and the peculiar nature of Interna-

* JOSEPH HAVEN. Moral Philosophy, page 24.

tional Law, caused by the unsettled character of its Spirit of Law (§ 14), necessarily extend the sphere of International Jurisprudence, which, whilst expounding the meagre text of the positive elements of treaties and customs, must needs supply,to some extent, this want, by applying the necessary element of Justice, and thus establishing a sort of Judicatory Legislation, in order to arrive at a general and practicable system of International *Corpus Juris*.

This constitutes International Jurisprudence a special science, embracing a vaster field than Civil Jurisprudence with its rich and well defined sources. But as it is of equal interest to all civilized nations to have the conditions of their mutual intercourse clearly brought to the knowledge of all, in order to make those rules respected and accepted as a common guide for all, the materials, necessary for the building up of an established International Jurisprudence, are slowly but continually contributed by all civilized nations, through the development of the International Spirit of Law.

The difference between Legislation, in the ordinary sense, and the rules put forward by International Jurisprudence consists in this, that the latter, having no authority but that of a few established maxims, cannot enforce its rules, but simply proposes its doctrines to human Conscience and Common Sense, and advises their acceptance, on the strength of their intrinsic truth, justice and utility. *

* "*Mais précisement parce qu'il n'existe pour le droit entre nations, ni législateur, ni juge, il importe au plus haut degré: 1o. De déterminer et de faire reconnaitre ces droits aussi clairement, aussi généralement que possible, par toutes les voies susceptibles de supplier à l'absence d'une législation écrite. 2o. De faire pénétrer, de répandre dans l'opinion publique et dans les Gouvernements Souverains le sentiment du respect de ces droits, la ferme résolution de les observer de son propre mouvement et avec fidélité à l'égard des autres, autant que les*

Present condition and definition of International Law.

§ 21. The Introduction of the Law of Conscience, as an acknowledged element of International Law, is only practicable to the extent to which the fluctuating standard of international morality, as existing at a given time between nations, by virtue of the respective moral civilization of individual States, will admit it (§ 7). A State's capability of being subject to Law evidently depends upon the exercise of a sense of right and of a sense of the obligation to act in obedience to it, either on the part of the community at large or at least of the person or body of persons in whom the will governing the acts of the community resides (Hall, page 13). International Law, being based on International Morality, depends upon the state of progress made in civilization. Hence arises the difficulty of giving an all-comprehending definition to International Law. What *ought* to be permanently understood among civilized nations as the main principles and the basis of their mutual intercourse, we have noted already to be the Moral Law of Nature (§ 4). But we have also seen (§§ 10–14), that the Spirit of Law is the practical medium through which this general Law influences humanity at all the stages of progress on the road to civilization.

Investigating thus this Spirit of Law, we find the definition of International Law to consist in *certain rules of conduct which Reason, prompted by Conscience, deduces as consonant to Justice, with such limitations and modifications as may be established by general consent, to meet the exigencies of the present state of society as existing among*

maintenir à son égard, afin que ce sentiment universel supplée autant que possible à l'absence d'un juge et qu'à défaut de tout autre moyen plus efficace, la désapprobation commune atteigne les violations que le plus fort ou le plus habile en voudraient commettre." ORTOLAN. *Diplomatie de la Mer.* Edit. 1864. Vol. I, page 58.

nations, and which modern civilized States regard as binding them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country. All depends thus upon the capability of the "conscientious person," who represents here the International Popular Conscience, which is the International Spirit of Law.*

From this it appears obvious that, in the present state of international intercourse between States, no immutable system for a generally acknowledged Law of Nations has, as yet, been arrived at, although the principles of the Moral Law of Nature are individually upheld by all civilized States, by the impartial application of Justice to all included within the respective territories.

State Policy.

That "Righteousness exalteth a Nation, while sin is a reproach to any People," this warning lesson of ancient wisdom which holds good for the rational dealings of Nation with Nation through all generations, is fully acknowledged, but the influence which the Moral Law, the Law of Conscience, exercises on the actions of a Nation, is not regulated by its national moral standard only, but also by its relative freedom from powerful outward causes of pressure, which may sometimes be beyond the control of its most conscientious leaders. Thus it is, that we sometimes see Nations act in contradiction to their Popular Conscience, as exhibited by their popular organs, and this for want of a free will to follow the dictates of that Conscience.

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* WHEATON. Edit. Dana. § 14. W. E. HALL. Intern. Law. Edit. 1880, pages 1 & 13.

"It is true indeed that a law controlling independent sovereign States can only become such by their free consent, it must, as we have seen, be voluntary. But this code of voluntary rules cannot, for that reason, be arbitrary, irrational or inconsistent with Justice." WOOLSEY. Intern. Law. Edit. 1879, page 14.

It is the aim of sound State-Policy, to keep clear of a position so degrading to the national character, and to secure free exercise of the National Conscience. *

Justice versus Power.

It has been stated, that there can be no law between Nations as there is no palpable authority nor any acknowledged common superior, no international executive to enforce the precepts of international laws. No Nation will take up arms to punish another Nation which, whilst engaged in warfare, wilfully disregards the common law of Nations. And it is fortunate that such is the case; for it was the attempt to set up such an authority of external nature over the affairs of Nations, which prevented so long the pure development which international morality might have enjoyed through the free progress of civilization. The inefficiency of such superior direction or international executive, which, in whatever shape it may clothe its authority, would never be free from the shortsightedness, egotism and partiality, which is the nature of all human institutions, is exhibited by history, in the struggle between Church and State for secular supremacy, in their claim to guide the destinies of the Nations of Europe, and in the feudal pretensions of the great Potentates of the East. What have they all led to but to a retardation of the free development of civilization. It is

* "The science which teaches the reciprocal duties of Sovereign States, is not a vain and useless study. If it were so, the same thing might be affirmed of the science of private morality, the duties inculcated by which are frequently destitute of the sanction of positive law and are enforced merely by conscience and social opinion. As the very existence of social intercourse in private life depends upon the observance of these duties, so the existence of that mutual intercourse among nations, which is so essential to their happiness and prosperity, depends upon the rules which have generally been adopted by the great Society of Nations to regulate that intercourse." Wheaton. Elements of Intern. Law. Ed. Dana. Pref. page 21.

true, "*pour ce genre d'infractions, il n'y a pas de juge ici-bas*," * and it is natural that such is the case; for what human institution could sit in judgment over transgressions of this nature, over crimes committed by Nations. The Judge required is not personified on earth,—no more than the Great Regulator of our moral obligations, who imparts to our minds, through the Soul, a ray of His Spirit for our guidance, so that, notwithstanding this absence of a visible judge, civilized humanity finds itself restrained by the irresistible power of the human Conscience, which, in affairs of nations, has a sure agent in Public Opinion, the organ of the Popular Conscience, and whose reprehensions are not seldom the visible powerful factors of effectual retribution.†

It is not the physical enforcement of a law which constitutes its legality. The principal condition for the existence and maintainance of all necessary laws is moral sanction, for no power, be it ever so strong, can uphold an unjust law for any length of time. Justice is a Law of Nature and not the offspring of human power, for what becomes of the power which is not based on Justice? Let History speak and we shall find that where the two are combined, there it is Justice above all which is indispensable for the preservation of power. The pretention that might is right was regarded by Goethe as an infernal principle, when he put in the mouth of Mephistopheles the words, *hat man Gewalt, so hat man Recht.*‡

* Letter of Count von Moltke to Professor Bluntschli, dated 11th December, 1880. Revue de l'Institute de Droit Intern., Vol. XIII. 1881, page 80.

† HEFFTER. Le Droit Intern. de l'Europe. Trad. I. Bergson. Ed. 1873. §2, page 3.

HALLECK. Intern. Law. Comm. by Sir Sherton Baker. Ed. 1878. Ch. II. §§13-16.

‡ "*Le Droit règne à d'autres conditions que la Force—il suffit à celle-ci d'être toujours la force ou la paraitre; il faut qu'elle s'allie à l'ignorance. Le ressort de la terreur ce détent à la lumière, celui du*

The broad basis on which the principles of International Law rest, makes it possible to comprehend all mankind in the sphere of this Law, as it is applicable not merely to the intercourse existing between Christian Nations, but also to the intercourse existing between these and non-christian people, and to the intercourse existing between these latter, while it is also binding on civilized Nations, as far as practicable, in their dealings with uncivilized Nations for purposes of mutual benefit. Equality of States, whether in civilization or in dependency, is not a necessary condition for the conception of legal relations existing between States on the basis of the Moral Law of Nature.*

Whenever Nations come in contact with each other, their mutual intercourse is subject to the Law of Nature, as the Law which is morally binding before any regular compacts have evolved from such intercourse.

Another essential consequence of the supreme government which the Moral Law of Nature exercises as regards the affairs of Nations is this, that, by applying or keeping in view these principles, any differences which might arise between States, can on the basis of this Law be settled by arbitration, for when the absence of positive

droit s'y fortifie; la force se manifeste par la banalité de ses attaques, le droit ne se revèle, ne se montre aux hommes que sous des formes intelligentes, ou il cesse d'être le droit; émané de l'intelligence, il ne peut s'adresser qu'à elle. C'est un élement qui recherche et poursuit à travers tout ce qui n'est que matériel, reservant accueil et sanction à tout ce qui a passé par l'ame et désaveu à ce qui n'est pas marqué de ce sceau." Le Droit dans ses maximes, *page 135.* Rittiez. Science des Droits, *&c. Ch. XV.* § 4-7.

* The result of the Dutch arms in Acheen is one of the proofs furnished by modern history, that moderation in warfare towards uncivilized people is not only duty, but secures success.

H. I. H. THE DUKE OF LEUCHTENBERG's letter to Prof. Martens of St. Petersburg, of 19 February, 1881, with regard to the Laws of War (see Revue de Droit International, 1881, p. 307) proves practically that it is possible to respect these Laws under exceptionally trying circumstances.

instruments and proofs might render arbitration doubtful or impossible, there are the principles of Justice and Humanity in which all agree.

The Ethico-Historical system of International Jurisprudence.

§ 22. The great problem which the simple question, "What is right," presents to our mind, when brought to bear on questions of equity in International Jurisprudence, has called forth two distinct views with regard to the nature and origin of International Law, there being no Legislative Authority to determine the principles of this Law. The one, the tendency of which is to look to the human Conscience, as directed by the Moral Law of Nature, for its principle element of Law in international intercourse and called the *Philosophical Idealistic School*, whilst the other, styled the *Historical Practical School*, acknowledges only the positive element of International Law, composed of treaties and customs.

These two systems or views are defined by Mr. HALL as follows. "International Law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforcible by appropriate means in case of infringement. Two principal views may be held as to the nature and origin of these rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them. According to the former view, a dis-

tinction is to be drawn between international right and international positive law; the one being the logical application of the principles of right to international relations, and furnishing the rule by which States ought to be guided; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct or law of present authority, and changes and improvements in those rules can only be effected through the same means by which they are originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of States," * (comp. § 14).

As in every problem involving great social or moral questions, so also in this, both sides are represented by equally learned and conscientious men. In this fact lies the possibility of these two systems being reconciled in their practical application in Diplomacy. Thus, in so many instances of diplomatic intercourse, it was found useless to bring forward historical precedents of treaties or customs as arguments in the case, when position and circumstances are so constantly changing, or at other times, to explain, justify or criticize any point of the Positive Law of treaties and customs, without having recourse to abstract rules of equity. In all these cases the only reasonable appeal seemed to be to natural Justice, that is to the Law of Conscience (§ 7); so that, positive as the Practical Historical Theory may appear, it is often found wanting in efficiency. On the other hand, the Philosophical Idealistic School find palpable proofs for the validity of its doctrines in many historical facts of treaties and

* W. E. HALL. *International Law*. Introductory Chapter, p. 1.

established customs, thus often appealing to these proofs of the positive elements of International Law; and yet no treaty or convention can subsist, unless based on the Moral Law of Nature, which defines the criteria of its inviolability, its binding force being the general rule of Justice, as dictated by Human Conscience, viz., that voluntarily contracted obligations for lawful objects must be respected by all contracting parties. Even customs and usages of long standing invariably lose strength, the moment they cannot bear the test of Justice and advancing civilization. Moreover from this difference of systems, with regard to the elements of International Law, two different sorts of State Policy and their respective Diplomacy have arisen as their result. The one taking actuality for its starting point, looks only for material proofs and historical precedents for its arguments, and thus, banishing Moral Law from practical International Jurisprudence, causes Morality to shun Politics. The other, looking to the moral element of equity for its chief ally, tries to introduce Morality, which *ought* to form the basis of the internal policy of every civilized Nation, also in its external policy; a Diplomacy however, which in practical application might defeat its object, as not being always supported by the International Spirit of Law, which is the reflex of the *actual* state of moral developement of the external life of Nations.* (§ 14.)

* "*Si l'alliance des mots morale et politique parait avoir quelque-chose d'étrange, d'incohérent, ce n'est point au choses, c'est aux hommes qu'il faut demander compte de cette apparente contradiction. La Politique Extérieure, telle que la raison la définit, telle que la morale l'avoue, a pour basses la Justice et la Modération. Conseiller à un Peuple l'amitié de ses voisins, procurer des appuis à sa faiblesse, la défendre contre les prétentions de l'orgueil, contre les envahissements de la force et, si jamais l'adresse peut être permise, ne l'employer qu'à maintenir des relations de bienveillance, à écarter des occasions de rupture entre les nations que la jalousie, l'ambition et l'interêt tendent sans cesse à diviser, tel doivent être le but et les moyens de cette*

From the foregoing comparison of the two views or theories, it is obvious, that, to practical International Jurisprudence, both, the *Historical* as well as the *Moral* element of the Law, are indispensable. Thus arises a combination of the two systems, which may be called the *Ethico-Historical* theory.*

This system gives the following rules in the practice of International Jurisprudence, viz.:—

1. Look first, for existing treaties or conventions bearing upon the subject of negociation, for any rights or duties relating to it, direct or indirect.

2. If there be no treaties or conventions, directly or indirectly deciding the case, investigate the general and special customs, which, by usage of long standing, have created obligations affecting the matter. On this point it must be borne in mind, that these two elements of the Positive Law of Nations are sometimes contradictory or reacting on each other, viz., that treaties sometimes abrogate customs, whilst treaty stipulations may lose the necessary legal strength or force to convince, by prescription, through the tacitly acceding to undeniable customs of long standing and general expediency.

3. When both the conventional and the customary elements fail to give satisfactory solution in the case, then the opinions of text-books, as to what is to be regarded as the rule of Natural Moral Law, must supply the Standard of Justice,

branche de la politique que l'on a désignée sous le nom de Diplomatie." E. JOUY. *La Morale appliquée à la Politique. Chap. IV.* RITTIEZ, *Science des Droits*, p. 118.

* "The Law of Nations is founded upon Justice, Equity, Convenience and the reason of the thing." Answer of the British Government, of 18th January, 1753, to the Prussian Government on matters of reprisals, &c.

PHILLIMORE, Comm. on Intern. Law, Vol. I. Ed. 1879, p. 14 (*Sources of Intern. Law*).

as well for the settlement of the points on which the authorities of positive laws have failed, as to supplement and correct defective or vicious treaties and customs.

The practical order of classification of the three elements of International Law is thus as follows:—

1. Public Treaties.
2. Customs.
3. Abstract reasoning on what is right or wrong in the intercourse of Nations, that is the *Law of Justice.* *

To the Diplomatist the ethical value of an argument is of the highest importance, when put forward at its proper time; for moral validity is the test of all doctrines and not the less is this the case in international concerns, where the absence of positive elements of law makes Ethics the only common basis for transactions between Nations. If a doctrine has secured universal acceptance, the fact that it is universally accepted is the proof of its moral validity. If it has failed in this, there is no material power able to secure its final success, through its acceptance by human Conscience, and it is not only useless but immoral to put forward the relation in which such vicious usages stood once to acknowledged principles in barbarous ages or in a less civilized stage of development of society. If the Barrister has only to ask to what degree this or that principle has been acted upon, and if, through absence of positive law, precedents are the only sources from which, for *his* purpose, authority in a disputed case can flow, the Statesman is bound to take a broader view and cannot ignore that the bond of Justice is the only lasting usage between Nations, for "International Law consists in

* *Ortolan*, Diplomatie de la Mer, Edit. 1864, Vol. I, p. 69.

rules of conduct which modern civilized states regard as being binding on them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country,"— and this, because these "rules" may be looked upon as a reflex of the moral development of the nations which are governed by them. * Those usages which a conscientious person regards as binding upon him and which may be looked upon as the reflex of the moral development of a Nation, can fairly stand the test of moral validity.

* W. E. HALL, p. 1.

CHAPTER IV.

HISTORY OF INTERNATIONAL LAW.

Historical development of International Law.

§ 23. Although it was at first only for motives of self-preservation, that nations were led to the adoption of certain rules to guide their mutual intercourse in peace and war, we find, at a very early date, not only in Europe, but also among civilized Asiatic nations, this pivot of single utility, the sole support of the old international usages, gradually broadening towards a vaster basis. The rules of warfare were established, theoretically at least, far more on humanitarian principles, whilst rules of intercourse in peace and war were tacitly or expressedly agreed upon, as emanating from the Natural Moral Law. Thus came to be established the inviolability of envoys and ambassadors, the right of asylum, the obligation of treaty, the principles of international maritime and commercial laws.

The foundation and development of the principles of International Law was brought about in Europe, since the fall of the Roman Empire, mainly through the influence of Christianity and through the adoption of the system of Roman Law, and Jurisprudence by nearly all the nations of regenerated Europe, which brought them under some degree of legal uniformity, especially with regard to the rules of obligation by contract and other law theories. But the strongest influence in this direction was exercised by the revived international intercourse through commerce and navigation; while, with the gradual abolishment of the Feudal system, the central governments of the principal States were compelled to enter

into direct and more frequent and regular intercourse with each other.

The multifarious causes which, as the history of the different nations of Europe shows, effected the progress of international Law, can only be fully understood through a systematical treatment of the whole General Political History of Europe. A summary statement of isolated facts, in the narrow limits prescribed by the object of the present work, would be of no practical use. We must therefore restrict our historical sketch to the special branch of Laws, concerning ancient maritime commerce, as given below (Chapter XVII) and refer our readers to the special Historical works regarding the progress of International Law in Europe and America.*

* A. H. L. HEEREN. Handbuch der Geschichte des Europaeischen Staaten Systems und seiner Colonien. Goettingen, 1809-1821. French translation, Paris 1840.

ROBERT WARD. Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the age of Grotius. London and Dublin. 1795, 2 vols.

HENRY WHEATON. History of the Law of Nations in Europe and America, from the earliest Times to the Treaty of Washington. 1842. New York, 1845, 2 vols. A most suitable sequel to the works of Ward.

ROB. VON MOHL. Die Geschichte und Literatur der Staatswissenschaften. Erlangen, 1855-1858, 3 vols.

F. LAURENT. Histoire du Droit des Gens, 3 vols., 3d Edit. Paris. 1853.

JOHN HOSACK. Rise and Growth of the Law of Nations. 1882.

PART II.

THE INDIVIDUAL RIGHTS OF STATES, AND THE MODIFICATIONS OF THESE RIGHTS.

CHAPTER V.

The Sovereignty Rights of States.

Sovereignty and Autonomy.

§ 24. In § 17 (page 58) we enumerated the International Rights, as qualifications indispensable to civilized States for the uninterrupted fulfillment of their duties and attributes, as such. The principal features of these rights and their correlative obligations are now separately sketched in this and the following chapters.

The term *Sovereignty* designates the possession of the supreme power of the State exercised, to its full extent, externally as well as internally; hence the distinction of Internal and External Sovereignty.

Internal Sovereignty is exercised in conformity with the Constitution of the State for purposes of government and internal policy; while External Sovereignty, in the exercise of its functions for the maintainance of external relations, on the principles of Independence and Equality with other States, is a subject of International Law.

The term Sovereignty is more particularly applied to the external attributes of the State, whilst Internal Sovereignty is, by way of contradistinction, then designated by the term *Autonomy*.

Government.

The Internal and External Sovereignty of the State is represented by its Government, the organ through which the relations of a State with other States are managed.

When a State has no definite Government, or is in a condition of anarchy, international relations are suspended without, however, impeding the Sovereignty of the State. In like manner,

recognition of a particular Government of a State might be refused by one or more States without calling in question the State's Sovereignty, by which is meant the Body-politic formed, collectively, of all the individuals composing the State in question.

Sovereign States. Sovereign States, also called Powers, are the following States or Unions of States.

1°. Those States which have the moral right and faculty of existence, on certain conditions indispensable for Political Individuality, as stated in §16 (page 55), and possess the means of maintaining this existence among civilised nations, and

2°. Those States whose chief Government, having complete power to enter into any international relation, is free with regard to its actions towards all other States, as well as in its autonomy, and independent of all established legal or *de facto* control by any other State.

Right to Recognition. The Sovereignty of a State has regard only to its actual political status in the Society of Nations, independent of its origin, the nature of its power or dominion, and the extent of its territory, and includes its Colonies and Possessions, as these, however distant they may be or scattered over the globe, constitute integral parts of the State.*

The right of a State to recognition as a Sovereign Power, depends solely on its possessing the qualities stated above. The question when or how those qualities may have been acquired, whether the State is still the same society as originally formed or whether it separated itself from a community of which it previously formed a part or depend-

* WHEATON. Elem. Int. Law. Edit. Dana. Part I. Ch. II. KLUBER. Droit des Gens. § 23. ORTOLAN. Diplom. de la Mer. Vol. I. Liv. I. Ch. II.

ency, is no concern of International Law. Political reasons may retard the formal recognition of a State by other States, but this does not debar its *right* to recognition. A State is *de jure* a Sovereign Power, the moment it has constituted itself *de facto* as such. This is the *status juris;* but it remains, nevertheless, of great importance to the newly formed State to be practically and formally acknowledged by the leading Powers as a Sovereign State. The choice of an occupant for a vacant or disputed throne, although belonging exclusively to the concern of the interested State, is seldom concluded without the concurrence of the leading Powers. This is a matter of etiquette as well as a guarantee for the peaceable establishment of the new Dynasty.

Union of Crowns. (Unio Personalis).

Mere influence exercised by one State upon the internal or external affairs of another State does not impair the Sovereignty of the latter. *

Neither is such the case when the Sovereign of one State is, at the same time, the Sovereign of another, when the union of several crowns consists only in the person of the Sovereign *(unio personalis)* which, by no means, implies the political Union of the States *(unio civitatum)* as each State preserves its complete and distinct Sovereignty. †

Neutral States.

A State whose territory has been declared *neutral*, by a pactum between neighbouring States, remains entirely independent and in complete possession of all its Sovereignty Rights, as this condition of neutrality,—which does not effect its independence, but on the contrary,

* PHILLIMORE. Com. on Intern. Law. Vol. I. Part II. CALVO. Le Droit Intern., Vol. I. Liv. II. HALLECK. Intern. Law. Ch. III.

† Thus the kingdoms of Sweden and Norway have the same king, in personal union. The King of the Netherlands is at the same time Grand Duke of Luxemburg, &c.

is a guarantee to its integrity,—is of special importance to the contending interests of those Powers, who, to keep the reciprocal condition of territorial rights and claims in proper equilibrium, have mutually pledged themselves not to trespass on the territorial rights of the neutral State, and this in order to maintain what is called the *balance of power*.

Protected Sovereignty.

A Sovereign State having contracted an alliance to secure the protection of one or more States against some act of direct or indirect aggression, threatened by other States, does not, by the mere status of a protected State, forfeit any part of its Sovereign Rights with regard to States outside the pact, provided that no condition of the treaty, regulating the protectorate, do, in reality, infringe upon any of the Sovereign Rights of the protected State.

Colonial Protectorates.

Another distinct sort of so-called protectorates is that which, sometimes, is established by Maritime and Colonial Powers over native States on islands or continents outside of Europe. This is mostly done in the political interest of the protector himself, but often, at the same time, for the more disinterested purpose of advancing prosperity and civilization among semi-civilized nations, for which end such alliances are essentially useful. This sort of dependency, however, might more suitably be called vassalage. The change of terms could not make any difference as far as the natives are concerned and the real position of the protected State would be placed in its proper light.

ary States.

Tributary States are those which are subject to tributary obligations or vassalage in relation to another State, with which they are connected

as their acknowledged Suzerain. In such cases, the degree of dependence is determined by the amount of freedom of action, which such a State may be left to enjoy with regard to its autonomy and its outward relations with other States. *

Tributary rights and obligations, like all other agreements among Nations, cannot be dissolved without the consent of both parties, and other States are bound to respect these rights and obligations. But when the Suzerain has, tacitly or expressedly, allowed his tributary to make treaties with other States independently, or to enter into any political or commercial agreements with other powers, unchallenged by the Suzerain State, the Suzerainty Right cannot subsequently be claimed at the convenience of the Suzerain State with the views of annulling the agreements in question.

Treaties, concluded by a Tributary or Vassal State, and having for their object the renunciation of vassalage or the placing of one State under the protection of another, require, at all times, the expressed sanction of the Suzerain concerned.

Tributary States are sometimes called *Semi-Sovereign*. Under this denomination all those States are comprehended whose faculties of Sovereignty are limited in consequence of their dependence upon other States.

Difference between Protectorate and Tributary Obligations.

The condition of a protected State is different from that of a Tributary or Vassal State. The protectorate is regarded as the result of a voluntary act of a State, placing itself under the protection of one or more States, by special contract and for certain temporary objects. These objects

* VATTEL. Droit des Gens. Prelim. CH. VERGÉ. Introduction. Martens. Precis du Droit des Gens. ORTOLAN. Règles Intern. Chap. I & II. HALLECK. Intern. Law. Edit. Sir Sherston Baker. Vol. I. §§ 1-19. CALVO. Le Droit Intern. Vol. I, Liv. II, § 50, etc.

may at any time cease to exist, in which case the protectorate becomes superfluous and thus revocable as having no more any *raison d'être*. On the other hand, the vassalage of a Tributary State is, in most cases, the result of former conquest or of a treaty made to avoid invasion, by which the right of conquest is waived in favour of that of tribute. The latter thus always implies dependency, irrespective of the amount of freedom which may *de facto* be left to the vassal in course of time and irrespective of the question how far the tie of dependency may eventually have been relaxed.

Tributary obligations or relations of vassalage, being interwoven with the history of the Tributary State concerned and bound up with the natural conditions of things, cannot ordinarily be departed from, without consent of the Suzerain. *

Another essential difference subsisting between a Tributary State and a Protected State is that the Executive Government of the former is subject to investiture by the Suzerain, which is never the case with a protectorate.

Union of Sovereign States.

§ 25. Different States are sometimes united, so as to represent, outwardly, one Sovereignty, though their respective internal conditions, with regard to government and legislation, may be more or less distinct or independent of each other.

Federal and Confederate Union.

Unions of States come under two principal categories, viz.: the Perfect Union, called *Incorporate States*, by which the Sovereignty, internal and external, of each individual State is completely merged in the community, forming a united Sovereignty †; and the imperfect Union,

* PHILLIMORE, Com. Int. Law. Vol. I. Part II, page 98.

† Such is the case of the United Kingdom of Great Britain and Ireland and of the States composing the Austro-Hungarian Empire, with some exceptions regarding the relation of Hungaria to the other States.

which is again of two sorts, namely the *Federal Union* and the *Confederacy*.

When individual Sovereign States form a Federal Union or a Confederacy, the external sovereign functions are delegated by all to one Chief-Government, in order to represent all or each of them (as the case may be) in the intercourse with other States outside the Union, whilst also the Internal Sovereignty of the several component States of the Union undergoes, at the same time, certain modifications, in conformity with the nature and conditions of the compact.

The distinction between a Confederacy *(Staatenbund)* and a Federal Union *(Bundesstaat)* is commonly understood to consist in this, that in a Confederacy each State completely retains its individual Sovereignty as regards internal government policy and legislation and also regarding its external affairs, in all cases not derogatory to the effect of the power delegated to the Executive of the Confederacy,—each State being united with the others in so far only as is strictly necessary for the common object of the Union, as defined by the pact. * On the other hand, in the case of a Federal Union, the different Sovereignties are incorporated in one Federal Government, both for external affairs and general internal policy, but each State retains nevertheless its complete autonomy with regard to internal State legislation, as stipulated by the Federal Constitution. †

The difference lies, with regard to the internal affairs, in the direct or indirect relations which

* Such is the case of the German Confederation and of the Swiss Cantons.

† Such is the case of the United States of America, Venezuela, Columbia, etc.

exist between the individuals composing each State and the Central Government or the representative of the general Sovereignty of the Union. In a Confederacy, the relation of the private individual subject to the General Government is an indirect one, that is to say it requires the mediation of the Government of each State, through whose agency the general laws of the Confederacy must be promulgated in order to have effect in the State. On the other hand, in a Federal Union, the relation of the private individual to the Federal Government is a direct one; the laws of the General Legislature, within the scope defined by the Constitution, being binding on all the subjects throughout the whole Union, without the interference of State authority.

The Chief-Government of a Confederacy represents its members, as regards all external relations, not only collectively, but also each State individually, whilst the Federal Government always represents the whole undivided Union. *

The Rights of a Sovereign State. Fundamental and Conditional Rights.

§ 26. Every Sovereign State is entitled to the full exercise of all the rights appertaining to a separate, distinct and independent organisation, collectively called the Sovereignty Rights, in any manner and under any condition, as long as it does not infringe upon the rights of any other independent State possessing equal faculties and rights.

The rights and attributes of each State are limited only by the Moral Law of Nature and by the usages founded thereon, by similar rights and

* WHEATON. Intern. Law. Part I., §§ 20–45. PHILLIMORE. Com. Int. Law. Vol. I. Part II. Chapter II.

attributes belonging to other States, or by contracted obligations.

The rights which naturally belong to a State, *per se*, for the sole reason that it is a State, as being essential to its existence as such, are called the *fundamental* or *absolute* rights, in distinction from the *conditional* or *occasional* rights, which are the results of particular conditions and circumstances of intercourse with other nations, or the consequences of the exercise of the absolute rights.

These Rights enumerated.

The absolute or fundamental rights of Sovereign States, under which classification all cases or details of International Law must be comprehended, (as stated on page 58) are the following:—

1st. The Right of Existence and of Self-preservation, which involves the following conditional rights:—

a. The Right of Redress, which implies the principles of Amicable Arrangement and Transaction or Compromise, of Mediation and Arbitration, and also of Conference and Congress.

b. The Right of Retribution and Retaliation.

c. The Right of Reprisal.

d. The Right of Seizure of the object of dispute.

e. The Right of Interference and Intervention.

f. The Right of making War and concluding Peace.

From the Right of Self-preservation devolves the principle of Balance of Power.

2nd. The Right of Independence which includes that of Equality and Respect.

3rd. The Right of Property (Territory).

4th. The Right of Legislation.

5th. The Right of Intercourse, Representation or Legation and International Commerce.

6th. The Right of Negotiation and Treaty.

7th. The Right of Neutrality. *

The Right of Existence, of Self-preservation and Self-defence.

§ 27. Every State has, like every individual, the natural right of existence, from which devolve the Rights of Self-preservation and of Self-defence.

The Right of Existence, naturally the first of the absolute or fundamental rights of a State, forms the basis of all conditional rights. It imposes the most sacred obligations on all the individuals composing the State, as it is the guarantee for the integrity of the State, for the free exercise of all its rights and faculties, and for the security of the national institutions and the safety of all its members, collectively or individually.

In the maintainance of this right every individual member of the State is morally bound to co-operate to the full amount of his capabilities.

The Right of Self-preservation and Self-defence involves all other incidental or conditional rights necessary to place the State in perfect condition for purposes of defence, and to guarantee its safety and independence, without giving, by a disproportionate increase of aggressive warlike means, reasons for alarm or distrust to other States and, in consequence, for interference. †

Right of Independence.

§ 28. Independence is the right which naturally flows from that of Sovereignty of which it is the complement. It is the right of a Sovereign State to establish, maintain and alter its government, its constitution or any part of its

* WHEATON. Intern. Law. Part II. Chap. I. KLUBER. Droit des Gens. Edit. Ott. 1861, § 36. VATTEL. Droit des Gens. Prelim. § 15. HEFFTER. Droit Intern. §§ 29–31. ORTOLAN. Diplomatie de la Mer. Liv. I. Chap. II and III. HALLECK. Intern. Law. Edit. Sherston Baker, page 80 et seq.

† KLUBER. Droit des Gens. § 58. CALVO. Le Droit Intern. Vol. II. *Edit.* 1870. § 131.

internal organization and legislation, without the consent of any other State. In fact, the right of independence implies the right of a State to be exempted from any interference as regards its Sovereignty rights; Sovereignty being the right to act without being controlled. Independence implies the right to be left irresponsible,—as long as the exercise of Sovereignty does not impede the rights of others,—and to be treated on a footing of perfect equality by all other Sovereign States.

Right of Equality.

§ 29. The Equality which exists between Sovereign States does not proceed from equality of power, extent of territory or number of individuals composing the State, but from the similarity of those rights and obligations, which constitute the status of equality before the Law of Nations. The principle on which this right of equality is based is the same as that which, in civilized States, belongs to all citizens possessed of equal personal responsibilities, *i. e.*, the natural right of equality before the law of the country, irrespective of the amount of social or material preponderance belonging to individuals. Thus, in this respect as in many other instances, the *status juris* of States, with regard to International Law, is analogous to that of individuals with regard to their respective Civil Laws.

Right of Respect and Reputation.

The Right of Respect is asserted by the claim of an Independent State to be treated with due regard by other States; it includes the Right of Reputation, that is, the claim that others should abstain from criticizing its national reputation, while it is endeavouring to uphold unstained its national character and honour.

The inherent moral dignity of man must be found in the State; its total absence is a sure sign of approaching dissolution. Self-respect is

the fountain source of national virtues and a judicious pride in its own honour and reputation is a nation's first moral claim. National pride, when based on self-respect, will then not degenerate into that haughty demeanor and ungenerous bullying of weaker States, of which Europe, in its history of the last century, affords so many detestable examples. True national self-respect exhibits that genuine manly dignity and magnanimity, worthy of any great civilized Nation, which claims for itself what it considers to be a moral duty not to withhold, on its own part, from others vested with equal rights, although they may be unable to vindicate their rights by force.

Mutual Understanding with regard to the Right of respect.

Therefore, every State has the same essential interest in the prevalence of a mutual understanding with regard to International Respect, based on the following conditions, which are to be observed reciprocally.

Comity between individual States.

1st. Respect is due to the Right of Existence, Independence and Integrity of other States, and toleration is to be granted to all their other international rights, as long as the exercise thereof does not infringe upon the rights of others.

2nd. Respect is due to the moral and political dignity of the Executive Government, and such respect should be shewn by using the proper official titles and appellations of the State and its Sovereign or Chief Magistrates, in matters of correspondence, or when making reference to those dignitaries in public documents or in speeches delivered by statesmen in power.

3rd. Consideration is due to the adopted form of Government, to the Constitution and the Laws of a State. It is therefore commonly understood, that the National Institutions of each State should be reciprocally respected, by not being ignored

in the case of claims, negociations or occasional references.

4th. The National Fame forms the most precious regalia of a Nation and is guarded with a just feeling of jealousy from the attack of any one. Misrepresentation of historical facts, tending to lessen the glory of a people, is always a cowardly act, but when the Government of a State allows such misrepresentations to be recorded in official documents, in order to add surreptitiously to its own credit or to that of its officers, the act has all the ignominy of slander and must be followed by disgraceful consequences for the usurper.

No Government that is aware of its own dignity will allow its officers to disregard the just claim to reputation and respect possessed by other Nations. *

5th. It is particularly a display of want of respect and comity to allow combinations of conspirators openly to organize themselves for the overthrow of the established Government of a friendly State.

6th. Although, apart from treaty agreement, no State is obliged to help another in the administration of its Criminal Laws, which have, generally, no effect outside the respective territory or jurisdiction of a State, yet it is a moral duty of any civilized Government, not to allow the counterfeiting of foreign coins and bank-papers within its territory, nor to allow the organization of bands of smugglers on the frontiers with the object of making contraband inroads upon the territory of a neighbour, especially when these bands have been in armed contest with the officers of the State in question, and friendly appeal has been made from the suffering State for the suppression of the mischief.

* VATTEL. Droit des Gens. Liv. I. Chap. XV. Liv. II. § 14.

It is admitted as a general principle that, although not legally bound to do so, every Government is expected to suppress, as far as its constitutional laws will allow, any combination within its jurisdiction tending to violate the laws of a friendly State, especially with regard to acts which are punishable by its own laws when committed within its territory. Of course, faithful reciprocity is expected in all cases.

7th. It is regarded as a general principle of friendly international intercourse, not to exclude the subjects of any State from participation in those civil rights, securities and privileges which are allowed to other foreigners under similar circumstances; in other words, not to make a distinction between nationalities within the State's jurisdiction, unless it be on the basis of treaties of reciprocity.

8th. The observance of the ordinary rules of etiquette and public ceremonials is due to Foreign Sovereigns, their Ambassadors and Diplomatic Agents, to Vessels of War, to Foreign Princes and to Statesmen in power. In this respect every State follows its own regulations of maritime etiquette and other ceremonials, which, however, are nearly all of the same tenor, having all for their basis the acknowledged principle of equality between Sovereign States and Chiefs, and their Agents, and between Officers of equal rank; the aim being the mutual exchange of courtesy, as a token of good understanding between friendly Nations.

International Comity.

International Comity *(comitas gentium)* is the courtesy of Nations, which consists in the regard reciprocally due, in the intercourse of civilized Sovereign States, to those mutual rights and moral claims, which, although not forming an acknow-

ledged usage of International Law, are nevertheless based on the equality of Sovereignty. The maintenance of relations of comity on the part of all civilized States tends to promote mutual good feeling among Nations, and is thus of the utmost consequence for their general welfare.

Colonial Governments have many opportunities to show their appreciation of International comity and politeness.

The difference between *Comity* and *Private International Law*, which latter is often treated as identic with Comity, is noted in § 50.

CHAPTER VI.

RIGHT OF PROPERTY AND TERRITORIAL RIGHTS.

Private and Public State Property. Eminent Domain.

§ 30 The term Property, as Grotius defines it, is an appellation given to that which man calls his own, and which consists of *Jus Personale* and *Jus Reale.** Whilst the former of these terms has reference to movable effects, called *personal property*, which can be disposed of without any interference of municipal law, the latter of those two terms refers to immovable goods, called *real property*, the alienation of which is regulated by the formalities of law.

In an analogous manner, the Property of a State is considered to be either Private Property or Public Property. The Private Property or Domains of a State are of no concern to International Law. Such property is solely regulated through internal legislation, by virtue of which the Government of a State disposes of these properties with the same absolute right as any individual can dispose of his own personal effects. The Public Property or Public Domains of a State constitute property which, as being connected with the external Sovereignty Rights of a State, is subject to International Law as well as to the Internal Public Law of the State concerned.

There is another kind of proprietary right, which is peculiar to the status of a State, as Body Politic, namely the right of disposing,—by virtue of the attributes of internal Sovereignty, in certain extraordinary cases of public interest or necessity or for the public safety,—of property belonging to private individuals residing within

* GROTIUS. Introduction to Dutch Jurisprudence. Liv. I. Ch. I. Sect. VIII.

the jurisdiction of the State. This right, which is called *Eminent Domain (dominium eminens)*, is also regulated by the Internal Public Law of each State. *

The Territorial Rights of a State comprehend : *Territorial Rights.*

1st. All within the limit of the State, mainland as well as the islands adjacent to its coasts, also the seas, lakes and rivers, which are conterminous with the territory comprised within the boundaries of the State ; all, of course, with the exception of those portions of territories or waters, which are called enclaves, being situated within the boundaries of one State whilst belonging to the domain of another State.

2nd. The Colonies and Possessions outside the original boundaries of the Mother-State, independent of geographical situation or position.

3rd. Under the Jurisdiction of a State come also, besides the territorial properties above mentioned, the mouths and estuaries of rivers, the bays and a certain portion of the sea, called the *Territorial Waters*, being within the range of the coast-defences of a State or within a distance of *one marine league* (3 English marine miles) from any land belonging to the State's territory. This is called the *Maritime Territorial Jurisdiction.* †

* PHILLIMORE. Comm. Intern. Law. Edit. 1879. Vol. I, page 221. WHEATON. Edit. Dana. §§ 161–163. VATTEL. Droit des Gens. Edit. Pradièr Fodéré. Vol. I. § 235. HEFFTER. Europ. Völker. § 64. ORTOLAN. Domaine International. §§ 13 et seq. HALLECK. Intern. Law. Edit. Sir Sherston Baker. 1878. Vol. I, page 129.

† GROTIUS. De Jure Belli ac Pacis. Liv. II. Chapt. III. § 10-14 VATTEL. Droit des Gens. Liv. I. § 289. MARTENS. Précis de Droit des Gens. § 40. KLUBER. § 130. WHEATON. Ed. Dana. §§ 177–181. WOOLSEY. Edit. 1879. § 56. The Treaties between Great Britain and the United States, of 1818, and between Great Britain and France of 2nd August, 1839, settle the limits of exclusive fishery for each of the contracting States at one league or 3 English marine miles. The British Act of 1833 assumes the marine league as the limit of maritime territorial jurisdiction. Compare Chapt. XI.

Alienation of Territorial Property. The Territorial Property of a State may be alienated in either of the two following ways, viz., either to private individuals or corporations or to another State. In the former case the State retains its sovereignty and jurisdiction, with the right of eminent domain. In the latter case, Territorial Property being alienated by cession to another State, the Sovereignty Right, together with all its international consequences, is transferred along with the land to the State acquiring it, and the political nationality of the inhabitants of the ceded territory is exchanged for that of the new State.

Acquisition of Territorial Rights. § 31. Indisputed territorial possession exists in the following cases, viz. :—

1st. Possession from time immemorial or contemporaneous with the origin of the State.

2nd. By international treaties, through cession, transfer, purchase, gift or exchange.

3rd. Occupation of territory voluntarily abandoned by a former occupant; or of unoccupied territory without settled inhabitants or recognized owner.

4th. By right of conquest, legally established as possession and recognized as such after the conqueror has entered into peaceful possession, by virtue of a treaty of peace; for until then the conquest is merely an occupation by armed forces.

5th. By alluvial increase of the Territorial Property *(incrementum)*. Islands, formed by drift of river or sea-tides, belong to the Nation by whose land's mud or whose water's sand they were caused.

6th. By Usucapion and Prescription.

The right of possession once legally acquired continues for an unlimited period, unless it be

expressly stipulated otherwise by a treaty of temporary cession. *

Right of Occupation.

§ 32. The occupation and taking possession of property which has no owner, is a natural right, as all things on earth are for the use of man, and any individual has an equal right to anything that has not fallen into the possession of another.

The appropriation of territories must be followed by a *de facto* occupation. Right of property is not constituted either by the simple discovery of an island or any tract of land, nor by a temporary occupation after the discovery, if followed by total abandonment for an indefinite length of time. †

The principle that only continued *de facto* occupation of a territory constitutes the right of property is essential, and it is indispensable for the legitimation of the right of property claimed by those Nations which have occupied countries originally inhabited by savages or semi-barbarous natives, on the ground that these nomadic tribes did not comply with the natural obligation implied by territorial possession, viz., the cultivation of the ground. While living in an unsettled state, hunting and wandering from one place to another, these natives overran the land without occupying or inhabiting it, wherefore they do not suffer any real wrong when a civilized industrious Nation occupies a portion of the waste land with a view to make the neglected ground contribute to the support of the human race by judicious exploitation. On this principle Colonial Possessions are established.

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* PHILLIMORE. Comm. Int. Law. Vol. I. §§ 255-260. WHEATON. Edit. Dana. Pt. II. Chapter IV.

† Vattel. Droit des Gens. Edit. Pradier Fodéré. 1863. Vol I. § 208, page 491. MARTENS. Précis du Droit des Gens. Vol. I. § 37 KLUBER. § 126. HEFTTER. Droit Intern. de l'Europe. § 70.

The occupation of any *Terra Firma* is supposed to include the presumption of possession of its adjacent unoccupied islands, on the principle that, when two things are conterminous or in close connection, the more valuable annexes to itself that which is less valuable. Thus the possession of an island gives no right or claim on any portion of the opposite mainland. *

By an Act of Congress of the United States of America, which was approved on 18th August 1856, a general rule has been established with regard to the discovery and the use of guano islands by citizens of the United States (U. S., Laws, XI, 119), regulating the discovery and peaceful possession taken of deposits of guano on islands, rocks or keys, not being within the lawful jurisdiction of any other Government and not occupied by the citizens of any other Government. "Such island, rock or key, may, at the discretion of the President of the United States aforementioned, be considered as appertaining to the said United States, securing the citizens of the United States the use of the same for removing the guano deposits which they have discovered and legally taken possession of beyond the jurisdiction of any foreign State, with condition to sell or ship the guano to citizens of the United States only, and at rates fixed by Statutes. Nevertheless such islands, rocks or keys are not made part of the territory of the United States, and all acts done and offences or crimes committed thereon, or in the waters adjacent thereto, are to be held and deemed to have been done or committed on the high seas, on board a ship or vessel belonging to the United States, and be

* VATTEL. Droit des Gens. Edit. Pradier Fodéré. 1863. Liv. I. Chapts. VII and XVII. GROTIUS. Dutch Jurisprudence. Book II. Ch. I–X. CALVO Droit Intern. Vol. I. Liv. V.

punished according to the laws of the United States relating to such ships or vessels and offences committed on the high seas." *

Usucapion and Prescription.

Possession through Usucapion and Prescription is the right obtained on territory after long, uninterrupted and undisputed public occupation, provided this occupation of the land have been peacefully effected, through a *bonâ fide* presumed abandonment on the part of the former owner, and not by usurpation or through taking undue advantage of his error, misapprehension or weakness, or when he has been driven from the possession *by force majeure or by the violence of third parties.* †

The fait-accompli.

§ 33. Another mode of coming into possession of property or right, in time of peace, is the *fait-accompli*, which is the occupation of contested property by unexpected proceedings or surprise, with the aim of establishing a right of possession; thus placing the opposing party face to face with an accomplished fact which can be disputed only by force.

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* Wheaton. Elem. of Intern. Law. Dana's Note 104, on Guano Islands, page 255. Halleck Intern. Law. Edit. Sh. Baker. 1878. Ch. VI. Vol. I. p. 139.

† VATTEL. Droit des Gens. Liv. II. Chapter XI. WHEATON. Elem. of Intern. Law. Part II. §§ 164 and 165. PHILLIMORE. Comm. Intern. Law. Vol. I. Edit. 1879. Part III. Chap. 13. "L'usucapion et la prescription sont même, jusqu'à un certain point, plus necessaires entre états souverains qu'entre particuliers. En effet, les démêlés qui s'élèvent de nation à nation ont une tout autre importance que les querelles individuelles: ces dernières peuvent se règler devant les tribunaux, tandis que les conflicts internationaux aboutissent trop souvent à la guerre; il faut donc, dans l'intérêt de la paix, comme dans celui de la bonne harmonie entre les nations et des progrès du genre humain, écarter tout ce qui pourrait jeter le trouble dans le droit de possession des souverain, lequel, larsqu'il a reçu, sans conteste, la consécration du temps, doit être regardé comme imprescriptible et légitime. S'il était permis, pour établir la possession primordiale d'un état, de remonter indéfinement les cours des anneés et de se perdre dans la nuit des temps les plus reculés, peu de souverains seraient sûrs de leur droits, et la paix ici-bas deviendrait impossible." CALVO. Le Droit Intern. Theor. et Prat. Edit. 1870. Vol. I., page 289.

Possession taken through occupation on the principle of *fait-accompli*, can never claim prescription to legalize the right of property.

The *fait-accompli* is distinct from occupation or conquest effected by virtue of open war. Though both are based on the doctrine of "Might is Right," the latter is an assumption of power openly made with a fair chance of repulse, while taking possession by a *fait-accompli*, involves, unless forced upon a State by the necessity of securing its good rights against an aggressive party, all the immorality attaching to treacherous usurpation of power.

CHAPTER VII.

COLONIAL POSSESSIONS.

Origin of Colonisation.

§ 34. The original meaning of the term Colony, —as the latin word *colonia*, derived from the verb *colo* or *colere* (to till or cultivate the ground) and *colonus* (husbandman) indicate,—signified the transferring of people from one country to another for the purpose of cultivating the unhusbanded soil, and the allotting of lands to such emigrants for that purpose. These people were then called *coloni*. Hence the term Colonist. The meaning of the word Colony was, however, extended, so as to signify the country or place where such colonists settled. The meaning which we now attach to the word Colony is quite different from that given to the word as used in ancient history with regard to the Phœnician and Grecian settlements of emigrants. The term is now used, according to its most general modern acceptation, to designate various classes of the scattered territories of a State, situated outside the original boundaries of the parent State. The political constitution of such territories may differ from that of the latter, in matters of local legislation and internal finance, in conformity with the wants and degrees of civilization on the part of the original inhabitants of the soil, but such territories form nevertheless integral parts of the parent State, as a general Body-politic. On this head our present colonial system corresponds, to a remarkable degree, with the ancient Roman *colonia*, a system of organized municipalities which were situated outside the parent State, yet closely connected and responsible to its Central Government, and which made the same distinctions, in

according the privilege of Citizenship, as we practice now between the natives and the white population of our modern Colonies in the East.

The Phœnecians were early settlers in the fertile island of Cyprus, opposite their own coast, but their colonies extended also along the North Coast of Africa as far as the Pillars of Hercules, along the coast of Spain the Balearic islands, Sardinia and Sicily. Many of these soon threw off their dependence on the Mother Country and formed themselves centres of trade and colonization. From the Greek word Metropolis comes our expression Mother Country.

The earlier Greek colonies seem to have been founded on the same plan as those of the Phœnicians, especially by the emigration taking place after the Troyan war, into the Ionian islands, Creta, Rhodes, Corcyra, Aegina, Cos, and the coasts of Asia-Minor, Byzantium, Selymbra, Heraclea and other places on the coasts of the Euxine.

Then came the Roman system of colonization, for political and economical purposes, which resembles more the modern type.

The Venetian system was like that of Rome. The Venetians ruled over the people by means of their colonies and garrisons. But while the aim of the Venetians was conquest and dominion, the Genoese, who took possession of most of their colonies, principally sought to extend their commercial establishments.

With the progress subsequently made in navigation and increasing communication with distant regions, the system of colonization entered a distinctly new phase. It was no more applied to the relations of people of nearly the same race and little differing from each other in degree of civilization,—but colonization was now extended

to nations, vastly differing in race and intelligence and inferior in both of these respects to the colonizers. The preponderance of the latter, naturally resulted in the demoralization and the degeneration of the system, so that there was no more question of colonization but of the *exploitation* of countries, newly acquired through the suppression of the rights of the aborigines. This gave an immoral bias of arbitrary power and injustice to the colonial policy of the European States, from which it is but slowly recovering at the present time.

The European colonization of the 15th and 16th centuries exhibits, in the case of the newly discovered Western Hemisphere, aspects and results differing from colonization effected in the East. In the New World, European migration resulted, to a great extent, in the complete transplanting of the race, as well as the civilization of the respective parent-countries in the new possessions, and this by extinguishing the aborigines or by absorbing them in the conquering race. In the East, on the other hand, the European civilization, which Western nations brought with them, had but slow effect on the native remnants, left after centuries of stagnation, of what was once the height of the civilization of the human race.

Principles of Modern Colonial Policy.

§ 35. Colonial Policy in general kept equal pace with the civilization of the parent-countries. The Colonial and Maritime Powers of Europe and America view, at present, the occupation of or protectorate over native Islands or States from a different standpoint than that which jealousy and competition prescribed a few centuries ago, and nowhere has civilization shown greater power of development than in the Colonial sys-

tem, as exhibited by the history of the last four centuries. The new era of Colonial activity has abandoned the principle of taking advantage of the natives by demoralizing them. The aim is now to utilize large tracts of land for useful cultivation and to open new outlets for the commerce and industry of all parties. *

Treaties with independent native chiefs have no more for their sole object the securing of one-sided gains, but are now concluded on the basis of mutual security and always contain, now-a-days, clauses most beneficial to the material and moral progress of the uncivilised nations, by binding them to abstain from slave-trade, human sacrifices, piracy, and the like. Treaties between Suzerain Colonial Powers and the Native States under vassalage or protectorate, likewise, often contain stipulations controlling the importation of opium, fire arms and ammunition, in order to suppress these sources of infinite mischief and bloodshed among the uncivilized native populations, while the trade in all other commodities is left entirely free; no impediment being placed in the way of legal commercial intercourse between these native Protectorates and the subjects or citizens of third Powers. The revenue derived from imports and exports is also left entirely at the disposal of the Native Chiefs under protection.

The right of Colonial Powers to establish and exercise protection and control over neighbouring uncivilized Native States, emanates from the

* An example of this new Colonial regime is the recent Italian Colonization on the East Coast of the Red Sea in the territory of *Assab*, sanctioned by the Italian Legislature through the *Law of 5th July, 1882, No. 857I*, which authorizes the Government of the Mother Country to establish the legislative, administrative, judicial and financial organisation of the new Colony in comformity with its present local wants, but on a basis admitting of further development in conformity with its future progress.

necessity of self-preservation felt by these Powers, who, finding themselves compelled to take charge of the preservation of order and safety on the frontiers or in the neighbourhood of their islands and territorial waters, have a right to expect from all other Powers acknowledgment and respect of the treaties concluded with the respective Native Chiefs for such purposes.

In the case of a country not under actual territorial occupation or jurisdiction of any Western Power, the right of traffic and commerce with the aborigines and native chiefs is incontestably open to all nations and free from tolls and charges of all description for the benefit of any foreign Power,—provided the treaty stipulations agreed to between the respective chiefs and the Western Suzerain Colonial Power are respected by the foreign vessels and traders visiting such native ports or islands.

Responsibilities and Rights of Colonial Powers.

§ 36. It has been noted above that Colonies and Possessions form an integral part of the State to which they belong, independent of geographical conditions; the original State being called the mother-country. However, as these Colonies and Possessions often form the outposts of the civilization of the mother-country, special consideration is due to their policy and legislation which, as such, may differ from the internal Public and Private Law of the original State.

The fundamental difference between the legislation of a State and its Colonies and Possessions, cannot be allowed to infringe upon or modify its International obligations towards other States. In other words, a State cannot appeal to the exceptional character of any colonial legislation as a necessity for exemption from any generally acknowledged rule of International Law, for this would give to Colonial Powers an undue privilege

above other States that have no such additament. In the present stage of civilization and in view of the progress which has been made in International intercourse, all narrow minded colonial jealousy is utterly out of season. No Power following a wise and liberal colonial policy (the only one which can exist now-a-days) ought to have any reason to fear the neighbourhood of any other friendly Power in a colonial settlement. On the contrary, every well-minded and able colonization scheme should be wellcome as a new fellow-worker in the great field of civilization, for the formation of millions of new centres, productive of trade and consuming the products of industry.

It is no contradiction of this general rule, if we say that, when placed in the light, in which, through the progress of civilization, Colonial Possessions must be viewed in our days, the amount of responsibility and care which devolve upon States which now-a-days take the lead of civilization among barbarous or semi-civilized nations in distant regions, and often with great sacrifice to the mother-country, must also be taken into consideration. When the Colonial Policy of a State is scrutinized, one must not leave out of account the responsibility devolving upon every Colonial Power, for thus only fair comparison can be drawn with other States, which are free from all such incumbrances and restraint on their national development and internal aggrandizement.

It is a matter of simple justice then to view both sides of the question, and when a Colonial Power practices, as far as is consistent with self-preservation, a liberal colonial policy, adverse to the principle of exploitation of the natives and free from the old colonial jealousy of exclusion

of foreign enterprise and commerce, it is not too exacting to expect other States to restrain their subjects from causing trouble among the natives, and to respect treaties with third Powers and their legal claims.

CHAPTER VIII.

RIGHT OF LEGISLATION AND JURISDICTION.

General Principles of the Legislation and Jurisdiction of a State.

§ 37. The exclusive right of Legislation on all matters within its territories and, with regard to its subjects or citizens, wherever they may reside, is essential to the Sovereignty of a State.

The Judicial Power of a State is co-extensive with that of Legislation within its territories and, with regard to its subjects, in some instances, which will be noted hereafter (§§ 45–49), also outside its domain.

All individuals within the territory of a State, its own subjects or citizens as well as aliens, whether domiciled or temporary residing, are,— with some exceptions established by Treaty or through usage of International Comity and the Rules of Private International Law (Ch. X),— subject to the legislation, jurisdiction and control of the State. They have consequently equal right to protection and equal claim to legal and practical security in the transaction of their lawful business; wherefore, as a general rule, the tribunals of a civilized State are open to foreigners, in the same manner and to the same extent as they are open to its own subjects, to have justice administered to them in conformity with its Laws. *

Public Law. Law of Persons. Private Law. Civil Law.

The Right of Legislation of a State embraces Public Law *(jus publicum)*, the Law of Persons *(jus personarum)* and Private Law *(jus privatum)*.

PUBLIC LAW has reference to the constitution and sovereign government, finance, policy and

* HUGO GROTIUS. Dutch Jurisprudence. Ch. XIII. Sect. III.

to the general management of the State, of the interests of its subjects or citizens *(Staats-angehörigen)* and of its internal and external affairs. Public Law includes, accordingly, POLITICAL LAW *(Staatsrecht)*, PENAL LAW *(Criminal Recht)* which covers also *Police Legislation*, COMMERCIAL and MARITIME LAW and PUBLIC INTERNATIONAL LAW.

Political Law (Staatsrecht).

The Political Law of a State comprehends those legislative acts which establish fundamental rules with regard to the criteria of what constitutes its Political Nationality *(jus civitatis)*, and with regard to emigration, domiciliation in foreign countries and expatriation of its subjects; with regard to the admittance of foreigners to unmolested passage or peaceable residence, their Right of Asylum and Domicile, their prohibition, extradition or expulsion, also with regard to questions of exteritoriality, and the conditions required for the naturalization of aliens.

Law of Persons. (Jus Personarum).

The Law of Persons *(jus personarum)* establishes the legal status of the individual, with regard to his personal conditions, his age, profession, parentage and affinity, including the rules of registration of birth, death, marriage and divorce, the formalities appertaining thereto and the relative legal consequences and obligations. The Law of Persons establishes further with regard to every individual, his capacity to possess and to acquire rights and things, movable and immovable, which are termed personal and real property. The Law of Persons includes finally the rights relating to succession and to the capacity of making a will, and the relation in which the individual stands to Private Law, that is to say, his capability of performing legal acts and transactions in connection with the obligations which correspond to things and to rights.

Political Law regulates the relation in which the individual stands to the State, while the Law of Persons governs his natural status and the mutual relation of individuals in and outside of family-life.

Private Law (Res, Jura, Obligationes).

Private Law is the term by which are comprehended the principles on which are regulated the private interests of individuals with relation to things and to rights, and the obligations which correspond to them, *(res, jura, obligationes)*, embracing the Law of Contracts, the rights and liabilities *ex-contractu*, and the legislation which regulates rights and claims to things movable or immovable, the transaction originating therefrom and the means whereby rights in general may be judicially vindicated and executed or realized.

Civil Law (Jus Civile).

The Law of Persons and the Private Law constitute what is called Civil Law *(jus civile)*, with the legislation, jurisprudence and jurisdiction appertaining thereto; thus including PRIVATE INTERNATIONAL LAW.

Political Right *(jus civitatis)* is the capacity acquired by Political Nationality and in some instances also by Domiciliation (§ 40), viz.: the right to take a part in the Government and the Legislation of a state. But with regard to Civil Right *(jus civile)*, there is rarely any distinction made between aliens and subjects or citizens.

Legislation and Jurisdiction of a State with regard to its external relations.

§ 38. The internal policy of a State is closely connected with its external success as a Nation, and, as the basis of this policy is the entire range of its legislation, it is obvious, that, in the present state of civilization and progress, the internal legislation of States exercises a growing influence on their mutual intercourse. This influence may well be borne in mind by the Legislative Author-

ities of every civilized State, when making laws for the regulation of the interests of their subjects, in order to frame those laws which come into direct contact with the legislation and usages of other Nations, on that liberal and broad ground, where all can meet for purposes of mutual and general welfare. To this end the study of International Law, in all its branches, is necessary for those who are called to participate in the legislation of a State or to administer its laws, but. more particularly is this study indispensable with regard to Private International Law.

External Relations of the Public Law of a State.

The branches of legislation belonging to the Public Law of a State, which have influence on its external relations, are:—

1st. Laws connected with Sovereignty Rights, as noted before, viz.: Nationality Laws, etc.

2nd. Laws regarding postal and telegraphic concerns.

3rd. Commercial Laws (*lex mercatoria*, §§ 58–65 and 79–84).

4th. Law regulating the monetary system, weights and measures.

5th. The Fiscal Laws.

6th. The Shipping Laws (§§ 66–78), *i.e.*, Laws regarding the Nationality of ships and ships-papers, regarding collisions or fouling, salvage, shipwreck, stranding and flatson, pilotage and quarantine.

7th. Laws regarding prizes and prize-courts.

As to Civil Law, the branches of its legislation which come more directly into contact with the laws of other States, and as such overlap the domain of International Law, are those concerning the personal status of individuals, laws regarding marriage and divorce, laws regarding wills, obligations, contracts and compromise.

The questions connected with Commercial and Shipping Legislation, which covers the principal ground of international intercourse, are treated in PART III, containing *Maritime and Commercial International Law*, while the conflicts of these laws of one State, with those of an other State, in their mutual commerce and intercourse, are subjects of *Private International Law*, treated in Chapter X.

With reference to Penal Law, the legislative and judicial powers of a State extend over offences committed by any individual within its territories, whether native or alien, with the exceptions hereafter to be mentioned (§§ 45–49).

In some particular instances those powers extend also beyond the territories of the State, viz.:—

1st. In the case of offences, as specified and prohibited under penalty by Public Law, committed against the integrity, internal or external safety of the State and its public institutions of commercial, domestic and foreign credit and its financial establishments as guaranteed by Law, wheresoever and by whomsoever such offences be committed, whenever the offender is found within the jurisdiction of the State or his extradition is obtained.

2nd. In the case of all offences against the Laws of Trade and Navigation of a State, committed anywhere by its own subjects or citizens.

3rd. In the case of all offences, committed anywhere, by a subject against a fellow citizen, when both, having their domicile within the Native State, are temporarily abroad.

4th. In cases, independent of the question of domicile, when murder or other grave offences or crimes, subject to infamous punishment, are committed, anywhere, by a subject against fellow citizens or foreigners, or by an alien against sub-

jects; whenever the culprit is found within the territory or his extradition is obtained; provided judgment have not already been passed and sentence delivered in the case by the competent law-court of the foreign State, within whose territory the offence in question has been committed.

The offences, stated above, for which a subject is punishable in his native State, though having been committed beyond its territory, are the same for which extradition is generally asked by a foreign State; thus any State, rendering punishable this class of offences, committed abroad by its subjects, can fairly refuse, on this principle, all demands for the extradition of its own subjects (Comp. § 44).

5th. In the case of offences committed on board of the Public Vessels (vessels of war) of a State, in any parts of the world,—on the high sea as well as within the territory of other States, and without regard as to the person by whom such offences be committed.

6th. In the case of offences committed on board of the Private Vessels (merchant-ships) of a State, when on the high sea and, in some cases of internal ship's dicipline, also in foreign ports, and, when such is stipulated by treaty, for minor offences between the crews in those ports.

7th. Cases of Piracy and those acts which are declared to be piracy by the Public Law of the State.

Piracy under the Law of Nations (jure gentium) are acts over which all States have equal right of jurisdiction, to try and punish, without regard to the question by whom or where such offences be committed, as this class of offenders against the Law of Nations do not possess any Political Nationality (Chapt. XIII).

8th. Action taken for the suppression of the Slave-trade.

International Conflict of Laws.

In Civil and Criminal Legislation, as well as in the compilation of Rules for the institution and settlement of judicial questions *(ordinatoria lites)*, every State has made certain provisions, establishing the principles on which the law-courts of the State shall treat questions regarding the conflict occasionally arising between the laws which govern transactions in foreign countries and those of the State interested in the same matter or affair. The International usages regarding conflicts of Law are sketched in Chapter X, which treats of Private International Law.

The Right of Legislation and Jurisdiction possessed by a Sovereign State extends over all persons within its territory, with the exception of those cases in which the claims of jurisdiction on the part of another State operate within its territory; such as in case of exterritoriality, granted by treaty or capitulation, or through common usage of International Law. These exemptions and privileges are:—

1st. To the reigning Sovereign or First Magistrate of another State and their respective suites, whilst temporarily residing within its territory on an amicable visit.

2nd. To representatives of foreign States and to the members of their legations.

3rd. To Vessels of War of friendly Powers entering its territorial waters.

4th. To armed forces of a friendly Power passing through the territory of a State, with the expressed or implied consent of the latter.

5th. To Foreign Merchant Vessels and their crews, in cases expressedly stipulated by treaty, or by *comity*, in conformity with International Usages (Compare §§ 45–49). *

* STORY. Conflict of Laws. §§ 5375–55. WHEATON. Elem. Int. Law. Ed. Dana. Part II. Ch. II. WESTLAKE. Priv. Int. Law. Ch. V. and VI. PHILLIMORE. Com. Int. Law. Vol. IV.

CHAPTER IX.

JURISDICTION OF PERSONS.

DETERMINATION OF NATIONALITY.

Determination of Nationality. Natural or Tribal Nationality.

§ 39. Nationality is called *Natural* or *Tribal*, when the term is applied to individuals of the same origin, race, people or nation, from an ethnographical or philological point of view. Nationality is called *Political*, when regard is had to the subjects or citizens of a State as Body-politic. When different peoples or nations are united into one State, individuals of the different Natural Nationalities have all the same Political Nationality of the State. Hence the Nationality which constitutes an object of International Law, is the Political Nationality, or Political Citizenship, which can be lost and acquired through acts of legislation.

Political Nationality.

Political Nationality is acquired: 1°., by birth, that is, from the nationality of the parents (not from the mere accidental place of birth). This is termed *Original* or *Native* Nationality; 2°., by law, called *Naturalization*.

The mere place of birth does not, *per se*, establish nationality, but the Nationality Laws of several States give to the place of birth such legal influence, that the individual, accidentally born in their territory or within their jurisdiction, though from foreign parents not domiciled there, has the right to declare, within a certain time after having reached his majority and become *sui juris*, that he will take the nationality of his place of birth, and on this declaration, when accompanied by actual domiciliation, he is then regarded as a

subject or citizen of the State, with complete possession of Political Nationality.

Married women follow the nationality of their husbands. Children born from married parents follow the nationality of their father, but illegitimate children (those whose parents are not married) follow the nationality of the mother. When such children are made legitimate, they follow the nationality of the father, provided the legitimation takes place when they are yet minors; but if they are made legitimate at a time when they are already of age, they can choose their nationality for themselves. Foundlings, whose place of birth cannot be proved, follow the nationality of the corporation or persons by whom they are adopted.

Political Nationality, is, in connection with International Law, the first phase of the personal status of an individual and remains attached to it as the predominating quality of this status, wheresoever the individual may be found, (§ 51). Political Nationality implies National Allegiance, which is, in connection with domiciliation, noted in the next section.

The jurisdiction of a State includes all individuals living within its territory, whether subjects or foreigners. Under the term subject or citizen *(civis)* of a State, are comprehended all persons possessing the political nationality of the State, whether originally or through naturalization.

Nationality of Domicile.

§ 40. Besides the Political Nationality, which comes from the State, to which an individual owes national allegiance, through birth or naturalization (as noted in the foregoing section), and from which he expects proper protection in his lawful pursuits of life, abroad as well as at home, there

is another form of National Character which is acquired by domiciliation, without the loss of political nationality, and is called *Nationality of Domicile.*

Domiciled Inhabitants *(subditus temporalis)* are those who, although not having renounced allegiance to their native or original State, have ceased to reside there and have taken a permanent abode in a foreign country, forming a class of inhabitants, with regard to civil rights, between the subject or citizen and the alien.

From this Nationality of Domicile results a temporary allegiance to the Municipal Laws of the Domicile, termed *local allegiance,* but which ceases the instant the individual leaves the State in which his domicile is situated.

Although this Local Allegiance does not supplant the allegiance which results from the Political Nationality, which is termed *national, original* or *native allegiance,* yet, as most questions of private rights to property or of commercial or political privileges and exemption, whether in peace or war, are, in the first place, tested by the fact of domicile and not by nationality and, moreover, by the strength of the enfranchisement granted, and the obligations which the privileges of denizenship *(jus indigenatum)* involves, with regard to the Municipal Laws of the Domicile in a Foreign State, the Nationality of Domicile must of necessity suspend the claims, which the individual has on the protection of his native State, to a not inconsiderable extent, as long as this state of domiciliation abroad does last. This claim for protection from the native country can even lose all ground, if brought to bear against the Government of the domicile, when the individual, though not being naturalized in his newly adopted country, has established himself there in

such apparently permanent manner as to show an intention of never returning to his native State *(sine animo revertendi)*.

An individual settled in this manner in a foreign State during a war to which his native State is a party, shares the fate of the hostile or neutral character of the foreign country in which he has fixed his domicile. *

From the foregoing it is obvious that the decision of what is to be regarded as the legal domicile of an individual is of the utmost consequence. There are various definitions of the term *domicile*, but all agree so far that the Legal Domicile of an individual is the particular place of his principal abode and home and the chief seat of his affairs and interests, established *with intention to remain there for an unlimited time*, whether this place is situated in his native State or in a foreign country. †

The principal criterion of Nationality of Domicile consists in this, that the residence at a particular place be accompanied by the intention to remain there for an unlimited length of time. This intention is proved by positive declaration, combined with corresponding acts, or, where no such declaration has been made nor avowal of intention exists, in deducing the intention from the following circumstances and facts:—

1°. Acquisition of property and investment of capital in real estate or in vessels sailing under the flag of the State of domiciliation.

2°. Resident establishment.

3°. Occupation; character of trade, commerce and business relations.

4°. Time of residence.

* HALLECK. Intern. Law. Vol. I. Chap. XII. WHEATON. Intern. Law. Edit. Dana. Note 49, on § 85, page 142.

† PHILLIMORE. Law of Domicile. §§ 11-16. HALLECK. Intern. Law. Vol. I. Chap. XII.

5°. Exercise of political rights and, in general, the acceptance of qualifications and the exercise of rights, which, by the local laws, are granted to settled residents only.

These points are to be investigated with certain considerations attached to them, as, for instance:—

1st. The mere possession of landed property without permanent personal residence upon it *(as non-resident landowner)* is no proof of domiciliation, whether the property be acquired by direct purchase or derived from inheritance.

2nd. This is also the case with regard to the establishment of a residence for occasional use; but the purchasing of a house and the fitting it up as a dwelling for the proprietor or his family, when taken in connection with actual residence of the proprietor, is a good proof of his intention to remain.

3rd. With regard to occupation or trade, domiciliation is proved when an individual has contracted partnership or invested the greater part of his capital in the country where he is residing. If his business relations and the character of his trade, occupation or enterprise are such as to require his constant personal attention or supervision or an indefinite period to bring his business to completion, the conclusion may fairly be drawn, that he intends to make that place his permanent residence, although no positive personal declaration to that effect can be proved.

4th. In certain circumstances, time of residence may also constitute conclusive evidence of the intention of permanent domiciliation, such as a voluntary residence, during a considerable length of time, in a country from which egress was generally free, taking in consideration all external and internal impediments or coercion preventing

any person leaving the place or returning to his native country, as in the case of exiles, refugees or fugitives, emigrating from their country on account of civil war or political persecution or commotion, for so long as the coercion lasts or the *force majeure* exists in the form of war, blockade, embargo or prohibition by general application of certain Municipal Laws, for the time being.

5th. The voluntary acceptance of Municipal charges or the exercise of the right of suffrage are likewise circumstances which furnish proofs of domiciliation.*

The Legal Domicile of the husband is that of the wife. The widow retains that domicile after her husband's death. After a complete legal divorce *(a mensa et thoro)* the woman has her own domicile. The domicile of the minor is that of the father or of the widowed mother or of the guardian; the domicile of the illegitimate minor is that of the mother. The domicile of the head of a family is also the domicile of the whole family, of the domestic dependents and of servants

* HALLECK. Intern. Law. Edit. Sir SHERSTON BAKER. 1878. From a note, in Vol. I, p. 365, we take the following extract. "During the civil war in the United States, all persons who had voted as State citizens were claimed by the United States Government as liable to the conscription; and the Act of Congress of 3rd March, 1863, expressly declared, that the levy should include all persons of foreign birth who shall have declared on oath their intentions to become citizens."

"Mr. S., a British subject, who had anounced his intention to become naturalised, applied, in October, 1862, to be informed whether he could claim the protection of the British Government. He was told, that, as he had so acted without consulting the British Government, he must not expect that, until a case should arise in which its interference might be requested, it would give any opinion of the view which it might take of such a case.—*Parl. Papers, 1862.*"

"In 1862, certain native born British subjects in Wisconsin claimed that, although they had voted at elections, they had done so under the State law as aliens, and had not thereby forfeited their British nationality. Mr. SEWARD replied that, so far as the executive authority of the United States was concerned, no foreigner who had not been naturalized, or who had not exercised the right of suffrage, had hitherto been required to serve in the militia."

living under the same roof or domestic establishment.

Exiles, banished for life from their country, are expatriated and lose their original or native domicile, together with their Political Nationality. Banishment for a fixed term of years, has in Civil Law, with regard to domicile, the effect of temporary absence, wherefore exiles of this class retain their claim on their native country and their original national character.

An individual, having more than one domicile, as a merchant carrying on commerce in different countries, is regarded, in time of war, to have the Nationality of the domicile of each of his places of business, unless he has, by positive declaration, corresponding with overt acts, designated one as his principal domicile. This must be done before the outbreak of hostilities, if he be a subject of one of the belligerent powers, for the reason that no change of nationality or transfer of domicile by emigration is acknowledged by the Law of Nations, when this is done during the existence of hostili-

"Mr. MERCIER, the French Minister, wrote in a circular to the French Consuls, that Frenchmen who had voted illegally in the United States had no doubt rendered themselves liable to legal penalties in that country, but that they had not forfeited their French nationality, or their right as aliens to be exempt from compulsory military service. And he referred to the laws of some of the States which admit aliens to the exercise of the elective franchise.—*Parl. Papers, No. 536, 1862.* The matter was referred by Lord LYONS to the Home Government, and he was instructed to abide by the decision of the American Law Courts."

"In 1863 certain able-bodied male persons of foreign birth, who had declared on oath their intention to become American citizens, were called upon for military duty by the United States. On this the British Government suggested that British subjects who had merely declared their intention to become American citizens, but had not exercised any political franchise, in consequence of such declaration, ought to be allowed a reasonable period after the passing of the Act to exercise the option of leaving the United States or of continuing residing therein with the annexed conditions. The United States Government thereupon allowed sixty-five days to such persons to exercise their option, and the British Government refused to interfere on behalf of any intended citizens who had not availed themselves of the opportunity.—*Parl. Papers, No. 337. 1863.*"

ties *(flagrante bello)*, by subjects of a belligerent State, with a view to protect their interests by deserting their legal alliance in time of war.

The Political Nationality is never lost, nor the allegiance resulting therefrom suspended, by the Nationality of Domicile or local allegiance. The obligations of the individual, with regard to his native allegiance, remain unimpaired, though his claim on protection, to be afforded to him by his State against the State in whose territory he has settled, and his *right of foreignership* with regard to this State, may, in many instances, be suspended by the local allegiance, which he owes to the place where he finds his daily bread or the comforts and pleasures of life.

The temporary national character, imposed by domiciliation in foreign countries, ceases with the residence from which it arose, with the *bona fide* intention to quit the country *sine animo revertendi* and having actually commenced the movements, by overt acts, performed in good faith.*

The characteristic feature of the Nationality of Domicile is, that it is presumed in the case of every established resident found in a country, till he give proofs of the contrary, that is until he proves that he is an alien having his legal domicile in another country.

Of this presumption of law, Halleck gives the following description.

"The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicile;

* HALLECK. Intern. Law, Vol. II., Chapt. XII.

but it rests upon him to disprove the presumption of the law, and to redeem his property from the noxious imputation; he must give such evidence of his intentions and plans as shall be effectual to destroy it."

In order to repel this presumption of the law, it is necessary for the party to prove that his original intention was to remain only for a short and definite period, that to accomplish the purpose of his visit, neither a long nor an indefinite period would be required; that his past residence had not been long enough, by the mere operation of time, to establish a domicile, and that he had not been so mixed up with the trade and navigation of the country, as to have acquired its national character, by the very nature of his occupation. The presumption is not repelled by merely showing that his wife and family are still residing in his native country, nor by proving that he contemplates returning to his own country at some future period, or after he has accomplished some particular object. He may have separated himself from his family, or the period of his return may be wholly uncertain and indefinite; or, if definite, it may be after a long interval of time, or his neutral character may have been superseded by his occupation, or by his being so incorporated in the trade or navigation of the country, that its national character is completely fixed upon him. In order to repel this presumption of the law, he must show clearly and conclusively, that such residence in the foreign country has not, by the law of domicile or otherwise, had any effect in changing his national character. *

* HALLECK. Intern. Law. Edit. Sir Sherston Baker, 1878. Vol. I, p. 367.

Obligations of a State with regard to temporary residents.

§ 41. With reference to an individual who by virtue of the laws of a foreign country has acquired the Nationality of Domicile (as noted in § 40), there is no occasion for intervention on the part of his native State for protection or claims against the State of his domiciliation for injuries sustained in body or property, through acts of war committed against that State by a third Nation or through internal commotion or revolution. However, when he can prove that the Government under whose protection he has taken his abode, is unable or unwilling to protect him from *discrimination* directed against him, by either of the belligerent parties,—whether the acts of discrimination are against him personally or directed towards his nationality,—his Government would fail in their duty by not offering him all protection in their power.

The Foreigner's Right.

Foreigners, domiciled or not, *cannot* be enrolled in active military service of any kind without their own consent. They may be compelled to help to increase, in time of necessity, the police-force, in maintaining social order in the place of their residence, with a view to public safety; also to take to arms to help in the defence of their place of residence against the invasion of savages, pirates, etc., as the means of warding off some great general calamity by which all suffer indiscriminately, but in neither case to be used directly or indirectly for ordinary national or political objects. *

An individual, temporarily staying or passing through a State, has a claim upon the protection of the laws of the State within whose territory he is admitted, by virtue of the State's legislation regarding the admittance of foreigners. This

* BLUNTSCHLI. Droit Int. Codifié. § 391. W. E. HALL. Int. Law. § 61.

claim is called the *foreigner's right.* Any act of arbitrary discrimination against him must be resented by his Government, and all actual damages caused to him by the acts of officers or agents of the foreign Government, not authorized by existing Municipal laws of the place, can give just claims for reparation.

Naturalization and Expatriation.

§ 42. By *Naturalization* an alien acquires the rights of Political Nationality or Citizenship of the State which naturalizes him. The means and formalities for acquiring Naturalization and the circumstances by which Political Nationality or Citizenship is forfeited, through expatriation or other acts inconsistent with allegiance, are provided for by legislation on the part of the Public Law of each State. This is also the case with regard to the question how far the original tie of allegiance is dissolved by the acceptance of titles, charges or functions from other States, by banishment and other causes of criminal judgments by which Civic Rights are impaired.

It was said above (§ 40), that the Political Nationality of the individual attaches to him even whilst he resides in foreign countries. This is the case as long as he retains his Citizenship, which cannot be renounced without being replaced by that of an other country.

No individual can be regarded as released from allegiance to the State to whose nationality he is resorting, and thus from responsibility towards that State or its laws with regard to future criminal proceedings, except by virtue of those laws or by the act of acquiring a new political citizenship, through naturalization, and entering into the allegiance of another State; which is tacitly understood to involve complete renunciation of all former allegiance. No formal abjuration or renunciation is required to make

an act of naturalization legal, it being generally admitted that the fact of having accepted naturalization, *per se*, includes renunciation of any former Citizenship.

The question whether a person is allowed to regard himself as having no nationality at all, or to belong to more than one Nation at the same time, is left to be decided by his own caprice or the amount of his individual self-respect, but, with regard to the Law of Nations, every individual, moving among civilized communities, must make up his mind to belong to one of them or be satisfied to be dealt with at the convenience of any Power within whose jurisdiction he happens to be found, and, if he has obtained more than one Political Nationality, his last legal Naturalization is regarded to be his actual nationality (§ 40).

Naturalization being regulated by Internal Public Law (§ 38), it comes, with regard to conflicts of law, under the provisions of Private International Law. But when naturalization has taken place in violation of personal obligations due to the native State, in consequence of the personal status of the naturalized individual, as for military or militia services due prior to the expatriation, questions of naturalization become subject to the rules of Public International Law.

On this head it is generally agreed, that naturalization does not protect an individual within the jurisdiction of the country of his first nationality against the claims of that country, for obligations he actually owed as a subject before his expatriation. However, in order to avoid possible contentions on this score, naturalization is often the subject of International Conventions, while the naturalization rules of most States

(in conformity with the generally adopted principle that the Laws of the native State govern the personal status of the individual) require from the applicant for naturalization the proofs of being free from all military or other personal or civic obligation resulting from his personal status in his native country.

At this point also Private International Law is concerned in questions of naturalization (§ 51).*

Emigration.

§ 43. The right of *emigration* is a natural consequence of individual liberty. No State can force its subjects to remain on its territory when natural human wants stir them to seek elsewhere the necessaries or comforts of life.

The old systems, based on the misused right of the Sovereign over his subjects, which formerly was adhered to by certain States to forbid emigration or to impose upon intending emigrants an obligation to procure the necessary permission, coupled with the condition that they return after the expiration of such permission, is happily done away with in European and American, and, for the most part, also in the great Asiatic States. The principle, which is but just and natural, now prevails of granting complete liberty to every individual to choose any place of abode where he finds the most promising conditions of the amelioration of moral and material existence.

This principle of free emigration does not exclude measures of restriction, passed with the object of regulating the manner of transport, or to provide for the individual safety of emigrants by insisting on some guarantee that proper treatment be accorded to them in the new country.

* PHILLIMORE. Comm. on Intern. Law. Vol. IV. WOOLSEY. Intern. Law. 1879. § 70. PHILLIMORE. Comm. on Intern. Law. Vol. I. 1879, p. 443 et seq. WHEATON. Elem. Intern. Law. Note of Mr. DANA, No. 49, on § 85. *British Naturalization Law of 1870. (33 Victoria Ch. 14).* HALLECK. Intern. Law. Edit. SHERSTON BAKER. Vol. I, Chapt. XII.

As every State has the right to regulate immigration to its territories as is most convenient to the safety or prosperity of the country, without regard to the Municipal Laws of the country whence the foreign emigration proceeds, international conventions are very often the only and, at all events, the most convenient means to regulate all questions of emigration. *

Droit d'Asile and Extradition.

§ 44. The *Droit d'Asile* in a general sense, is the right of an independent State to give admittance and protection, in conformity with the rules of its own legislation on this head, to all individuals who claim the hospitality of its territories with the wish to establish themselves under its jurisdiction, whether they come from their native or any other State and whatever might be the cause of emigration from their respective domicile.

It is obvious, that this faculty is not unlimited, and like all Sovereignty rights must be modified and regulated with respect to the rights of other States as well, for although a State's attributes, with regard to the maintainance of social order and the suppression and punishment of crime, is limited to its own territories or to cases in which its own laws have been violated outside its territories, yet it is none the less the duty as well as sound policy of every State to help to promote general morality. To grant admission and unconditional protection to all individuals, and, among these, also to professional criminals and characters of the worst description, who, fleeing from justice, take refuge in the territory of a neighbouring State,—would be an insult to Universal Justice and to the Public Conscience of civilized nations, and a State thus acting would undoubtedly compromise its own internal and

* CALVO. Droit Intern. Vol. I. Liv. VIII.

external safety while making its Right of Asylum a source of the greatest inconvenience to its neighbours.

Protection is only due to those who are worthy of it; who, suffering persecution for the sake of their political or religious opinions, or being threatened to be crushed under the barbarous cruelty of laws acting against all principles of justice and humanity, seek refuge with a more moderate political or religious legislature, or claim the shelter of civilization.

The means of guaranteeing a State against the danger of abuse of the Right of Asylum by foreigners, must be found in a judicious legislation, whose provision it is to regulate the admittance within the State of foreigners, and their expulsion in the case of characters dangerous to the internal safety of the State or its social order, and also the extradition of criminals, claimed by the Judicial Authorities of a foreign State whose laws have been violated, to undergo their trial or punishment, in conformity with the Public Criminal Law of the State demanding the extradition.

The means of preventing a refugee misusing the hospitality of a neutral territory, by devising or continuing political plots against the State from whose domestic or political persecution he fled, is the right of the State to impose upon a stranger the condition of residing in the interior of the State or at a certain distance from the frontiers of the State in question. This confinement to a certain part of the State is termed *Internment.*

The *Extradition of Criminals* forms a subject matter of the treaties concluded between almost all civilized States. Most States have, *â priori* fixed, by legislation, the rules and principles on

which they will conclude treaties for the extradition of criminals with other States.

This legislation is a subject matter of the Public Law of the States. The rules for extradition, being established more or less on the same basis by the greater part of the States of Europe and America, will, when compared, be found to consist of the following general principles.

I. No State will surrender its own subjects, whether native or naturalized citizens, to the judicial criminal prosecution or judgment of another State.

Several treaties, moreover, contain stipulations to the effect that under the term "subjects" or "citizens" are comprehended those aliens, who, by the laws of the State from whom extradition is requested, are, in questions of extradition, *assimilated* with citizens or subjects, that is, those who, though not personally naturalised, have obtained the Nationality of Domicile (§ 40); also any foreigner domiciled in the State, who, having married a woman, native of the State, has had from her one or more children born in the State, such children being, by the law of the State, regarded as native born subjects, and thus protecting the "foreign" father of the "native born" subject.

With regard to those who possess merely the Nationality of Domicile, however, a distinction is made when their extradition is demanded by their own native State.

II. Extradition of aliens takes place on demand based on judgments of Law Courts, public judicial accusation or citations of the Judicial Authorities, in accordance with the laws of Criminal Jurisdiction of the State which demands the extradition, and only for such crimes and offences as are stipulated in the respective trea-

ties. These are, murder and attempt to commit murder, rape, forgery, arson, embezzlement by public officers (when this is punishable with infamous penalty), burglary, felony (qualified theft), forging or knowingly passing or bringing into circulation counterfeit coins or banknotes or other paper current as money, with the intention to defraud others. Embezzlement by hired or salaried persons to the detriment of their employers, is included when such crime is subject to infamous punishment.

III. The extradition shall only take place upon such evidence of criminality as, according to the laws of the place where the fugitive or accused is found, would justify his apprehension and committal for trial, as if the crime or offence had been committed there; Political and purely Military offences are excepted (comp. *Military Deserters).*

The hearing and considering of the evidence of criminality, with a view to committal by the proper examining judge or magistrate, whereupon the warrant may be issued for the arrest of such fugitives, comes under the provisions of the *lex fori* (§ 52), if not otherwise stipulated by treaty. The quantity of evidence, necessary to procure extradition, is also agreed upon by the treaties of extradition.

IV. Extradition for purely political offences is invariably excluded.

Political conspiracies which involve plots to commit assassination or any other crime, for which extradition is allowed, are not regarded as purely political offences; even when the plot did not have the contemplated result.

Military and Naval Deserters.

V. The Extradition or rendition of Military Deserters from the Army or Navy depends almost invariably on special treaty stipulations. This is, however, not the case with seamen who deserted from vessels within territorial jurisdiction. The help of the local police, for the arrest of seamen staying over their time ashore, is never refused by the local authorities to any friendly vessel, public or private, within the territorial waters, provided this constitutes *simple* or *disciplinary desertion*, punishable by merely disciplinary punishment. But criminal or qualified desertion, that is desertion combined with or complicated by offences, which are punishable, after judicial investigation, by judicial sentences,—whether by Court Martial or Civil Tribunal,—comes under the head of Extradition of Criminals, when there is no treaty with regard to the mutual delivery of Military Deserters, and must be treated accordingly, that is, in conformity with existing treaties or with generally adopted International usages on this head.

Simple and qualified desertion.

Extradition of criminals does not take place then through diplomatic interference, and with all the formalities prescribed by the respective treaties of extradition.

Rules regarding the Re-integration of Seamen, deserting their vessels, in the territorial waters of a Foreign State.

The rendition or re-integration of naval deserters of vessels in port, or within territorial waters, having for its object the facilitating of commerce and navigation, is free from the judicial formalities which is inseparable from the extradition of criminals. The proceedings are simple and expeditious and subject to the following rules.

1°. The request for the arrest and rendition or re-integration of the deserted seamen is made

by the Consul of the nationality to which the vessel in question belongs, in writing, to the competent local Authority, accompanied by authentic proofs that the individual reclaimed forms part of the vessel's crew,—which can be done by exhibiting the crew list or muster-roll *(rolle d'equipage, Muster-rolle)* when it regards a private merchant vessel.

2°. The arrested Naval Deserters shall invariably be placed at the disposal of the Consul of the nationality of the vessel to which he belongs, in order to be sent on board. The arrested Naval Deserter can be also kept in custody, if there be no opportunity to despatch him, at once, to his vessel. His detention shall, however, not exceed *thirty days;* this being the customary limit of time during which the arrested Naval Deserter is kept by the local Authorities at the disposal of the respective Consul. After the expiration of the time limited, if not sent to his vessel or shipped on board another, he is invariably set at liberty and is not liable to further arrest or rendition on the same charge.

3°. As this summary mode of surrendering Naval Deserters is based on the consideration that the deserter is claimed for the immediate active service of the vessel and as, to use the words of ORTOLAN *(Diplom. de la Mer. Vol. I, p. 313)* "*la necessité de faire rentrer immédiatement à bord des navires les hommes qui en composent l'équipage, qui y sont indispensables pour le service, et dont la désertation pourrait même mêttre le navire hors d'état de naviguer,*" makes it impossible to resort to the ordinary mode of extradition through Diplomatic agency, it is obvious, that where this consideration does *not* exist, and the individual is claimed to be placed under arrest

to undergo a trial before Court-Martial or a Civil Tribunal, there is no reason of expediency to deviate from the ordinary proceedings of extradition. For this reason, when there exists no treaty of extradition of Military Deserters, a Government, appealed to for the rendition of the deserters of a Vessel of War, can insist on a declaration, to be given in writing, by the chief officer in command, that the individual reclaimed has committed no other offence than that of *simple desertion*, punishable by ordinary disciplinary punishment. If the Military Deserter is charged with any offence not mentioned by the existing Extradition-treaty affecting the parties, the State which surrenders him has the right to make the rendition of the deserter depend upon the *conditio sine quâ non*, of his not being prosecuted for the sake of that offence. *

4°. The costs of arrest and detention during the time limited are charged against the account of the Consul who claimed the delivery.

5°. If the deserter has committed any offences against the laws of the country, he is not delivered to the vessel until he has gone through the judicial proceedings attached to the case, nor until the judgment of the competent tribunal has had its effect in the matter.

6°. Deserters belonging to the nationality of the State in whose territory they take refuge, cannot be arrested nor be forced to join the foreign vessel from which they deserted, although they are always liable for damages, caused to the vessel through their desertion; which damages can be claimed before the competent tribunal of the State (§ 49).

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* ORTOLAN. Diplomatie de la mer. Vol. I, pp. 309–313.
F. PERELS. Auslieferung desertirter Schiffsmannschaften. (*Marine Verordnungsblatt, 1883*).

Modifications of the Sovereign Right of Jurisdiction.

§ 45. The exemptions from the jurisdiction of a State which, in certain cases, exist with regard to foreigners within its territory, or with regard to its own subjects in places outside its territory, to which, as a rule, in ordinary circumstances, the jurisdiction of the native State would extend, can be considered under four different aspects. For the better distinction of the circumstances under which the exemption of territorial jurisdiction is either conceded or made necessary, or assumed, those different aspects may be characterized by the following terms, viz. :—

1st. *Exterritoriality.*

2nd. *Self-jurisdiction.*

3rd. *Abandoned Jurisdiction.*

4th. *Concurrent Jurisdiction.*

Exterritoriality.

§ 46. Under the term Exterritoriality or Extra-territoriality *(jus exterritoriale)* is comprehended the immunity from local jurisdiction, conceded by a Sovereign State, whether by virtue of special treaties or in consequence of generally adopted usage; granting, expressly or tacitly, to foreigners within its jurisdiction, the right to retain, wholly or to a certain extent, their own national laws, with or without their own jurisdiction, that is, by complete or incomplete Exterritoriality (§ 38).

Apart from special agreement by treaty, the established usage and comity of Nations have acknowledged complete Exterritoriality in the following cases.

1°. The Sovereign of a State, when he is, by his own free will, temporarily sojourning in the territory of another State, is exempt from all jurisdiction of that State.

2°. Ambassadors or other Public Ministers, whilst residing within the territory of the State to which they are delegated, are not amenable to local, civil or criminal jurisdiction.

3°. Foreign armies and vessels of war or the Public Vessels of a friendly State, when passing through the territorial jurisdiction or sailing or anchored in territorial waters (Comp. § 27).*

Self-Jurisdiction. § 47. The Right of Self-jurisdiction, in conformity with the laws of the respective State, exists in the following cases.

1°. In the case of Vessels on the open sea, where no territorial jurisdiction exists, each Vessel is subject to the laws and jurisdiction of its own State.

2°. In the case of unappropriated soil, or in the case of territories not belonging to any community, whose jurisdiction is recognized by the Law of Nations, as constituting a government invested with legal power and jurisdiction. Such is, for instance, the case with semi-civilized or uncivilized countries, and with territories granted or sold by chiefs of semi-civilized or uncivilized countries to private individuals or to trading or colonizing companies; for under whatever form of organization they may be formed into commercial establishments, they do not constitute an integral part of any recognized independent State, which is so far possessed of an organized civilization, that its territorial jurisdiction over civilized Western nations could be admitted. In such countries now, and in those where there is no regular national government, there is no recognizeable local jurisdiction, and likewise in those places where the once recognized local jurisdic-

* WHEATON. Edit. *Dana*, §§ 95–102. W. E. HALL. Intern. Law, p. 135–166. CALVO. Droit, Intern. Edit. 1870. Vol. I, p. 647

tion is suspended, in consequence of anarchy caused by internal disturbance or external warfare. In such countries, consequently, each nationality exercises exclusively its own jurisdiction, whether on land or on board its vessels, and this on the admitted international principle, that every Sovereign is bound to retain jurisdiction and control over its subjects and citizens, beyond its territorial jurisdiction, in so far as such control can be exercised without derogating from the Sovereignty Rights of any other recognized State or without delivering its own subjects to the lawlessness or anarchy of uncivilized or incompetent jurisdiction. *

Abandoned Jurisdiction.

§ 48. Abandoned Jurisdiction is always temporary and confined within certain limits. It includes abandonment of protection from the State, as when the State has expressedly or tacitly renounced its right of jurisdiction and responsibility over some of its subjects, in cases such as the following:—

1°. In the case of those subjects who, by the acknowledged law of war, fall into the hands of a belligerent Power, for causes of violation of neutrality, against the declared will of their own Government; in which case the neutral State is free from all responsibility, when the acts are not committed by its own agents.

* PHILLIMORE. Comm. on Intern. Law. Vol. I. Edit. 1879. §§ 339–348, &c. ORTOLAN. Règles Intern. Vol. I. Liv. 2. Ch. 13. CALVO. Droit. Int. Edit. 1870. Vol. I. Liv. VI, p. 384. The *British Foreign Jurisdiction Act* 1878, in its fifth section, referring to countries where there is no regular Government, enacts that "In any country or place out of Her Majesty's dominions, in or to which any of Her Majesty's subjects are for the time being resident or resorting, and which is not subject to any government from whom Her Majesty might obtain power and jurisdiction by treaty, or any of the other means mentioned in the Foreign Jurisdiction Act, 1843, Her Majesty shall, by virtue of this Act, have power and jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country or place, and the same shall be deemed power and jurisdiction had by Her Majesty therein within the Foreign Jurisdiction Act, 1843." PHILLIMORE. Com. on Intern. Law. Vol. I, p. 473.

2°. In the case of private vessels with their crews, which are caught committing piracy or other acts against the Law of Nations.

3°. In the case of private vessels and their crews, legally arrested in territorial waters for acts committed in violation of the territorial law of a foreign State to which the territorial waters belong.

4°. In the case of those subjects who engage in the service of a foreign State.

5°. In the case of passengers on board a foreign public vessel in any waters.

6°. In the case of persons engaged in service on board foreign private vessels on the high seas and in foreign territorial waters. *

Neither jurisdiction nor protection is abandoned in case of those subjects, who at any time, in peace or war, may have been pressed into service, against their will, under the flag of any foreign State. †

Concurrent Jurisdiction.

§ 49. The following are cases of Concurrent Jurisdiction :—

1°. Consular Jurisdiction, with regard to the police supervision over private vessels of the respective Consul's nationality, in territorial waters.

2°. Cases of exceptions from the adopted rule of exemption or immunity from local jurisdiction, as for instance, when persons, entitled to immunity, voluntarily make themselves parties to the law-suit. Such is the case when contentious jurisdiction is conferred, on the Tribunal concerned, as, for instance when a Public Minister of a Foreign State voluntary submits to appear in the Court of Justice of the State to which he is accredited as the representative of his own

* W. E. HALL. Intern. Law. Edit. 1880. § 75.

† HAUTEFENILLE. Des droits et des devoirs des nations neutres en temps de guerre maritime. Vol. III. p. 291.

country, or when a Public Minister is a subject or citizen of the country to which he is accredited, provided that State have not renounced its jurisdiction over him.

3°. In cases of alleged illegal detention, on board a private vessel in foreign territorial waters, of any member of its crew or passenger, not belonging to the nationality of the vessel, and claimed by the Local Authorities or by the respective Consular Officer, through the Local Authorities of the State in whose territorial waters the vessel is at the time of the alleged illegal detention.

4°. In cases of Extradition of Criminals or Deserters (§ 44).

5°. In those cases, independent of the nationality of the culprit, in which the local jurisdiction prevails over the public vessel of a Foreign Power within the territorial waters of the State.

6°. Temporary military occupation of a country. Concurrent Jurisdiction forms part of the international attributes and functions of Consular Officers (Chapter XV).

CHAPTER X.

PRIVATE INTERNATIONAL LAW.

I.—*General Observations.*

International Usage with regard to conflict of Laws.

§ 50. Private International Law *(jus gentium privatum)* is that part of the General International Law which regulates, not the mutual relations of the States, but the private relations which occasionally occur between individual members of one State and the laws of another State.

Through the free intercourse which exists between Nations, it may happen that an individual has, at one and the same time, a legal claim to protection under the jurisdiction of different States, viz.: on the ground of his nationality rights, from his own State, and on the ground of business transactions or acquired rights, from another State. He may possess real property in one foreign State, where he is a non-resident land-owner *(sujet forain)* and has contracts or testaments to be executed by him in another State, where he resides, for the sake of business, as a temporary resident *(sujet passager)*, while his domicile is either in his own State, where he enjoys the Right of Domicile as well as his Political Nationality, or in a third State, where he has only the Nationality of Domicile (§ 40). Now, as an individual, thus situated, may often have recourse to the law-courts of one State to execute contracts or to secure or attest rights, entered into or acquired under the differing legislation of another State, his case must give occasion for conflict between his own rights, as the laws under which some of his rights are acquired and the laws which must secure the effect,

are not always the same and may sometimes be contradictory. This is what is termed *Conflict of Laws*, a natural consequence of the independent right of Legislation and Jurisdiction of Sovereign States and of the differences attending the provisions of law passed by the State to which the claimant belongs and by the State in which his properties are situated or where his rights are acquired by contract.

It is the interest of every State to promote internal prosperity, by facilitating transactions in real estate (in order to raise the value of its lands), as well as to facilitate commercial and social intercourse with other Nations. But as conflicts of law between States are decidedly opposed to such interests, it becomes more and more the policy of enlightened civilized States to endeavour, by acts passed by their respective legislature or by treaties with other States, or tacitly, by the decisions of their judicial or administrative Authorities, to harmonize the differences existing between the laws of States with regard to the rights of aliens, as far as their respective constitutional laws will admit of it. Thus, while, as a natural consequence of independence, the Jurisdiction of a Sovereign State excludes all foreign legislation from its territory, yet, through policy or justice and for the reasons just mentioned, several States have tacitly or expressedly consented to recognize and adopt, by legislation or jurisprudence, certain common rules or principles of jurisdiction with regard to foreigners within their jurisdiction and the laws of the respective States which govern the personal status of these foreigners, their properties, their actions and transactions. This gave birth to a distinct branch of the Law of Nations, called *Private International Law*, which has for its object the reconciliation

of the interests inherent in the Sovereignty of each State, in matters of legislation, with the respect due to the laws of other States. This reconciliation of conflicting interests is to be brought about by an adjustment of the differences which exist between the laws which regulate the interests of individual subjects of one State and the legislation of another,—while general Public International Law has for its object the regulation of relations existing between States and States. *

Definition of Private International Law.

The term by which this branch of International Law is designated, has often met with the criticism that it does not convey the proper idea and definition of this branch of legal studies as a science. Yet the term *Private International Law* is nevertheless the one which is most generally adopted. The reason thereof we find adequately stated by Mr. Woolsey in the following remarks. "It is the province of Private International Law to decide which of two conflicting laws of different territories is to be applied in the decision of cases, and, for this reason, this branch is sometimes called the *Conflict of Laws*. It is called *Private*, because it is

* WHEATON. Elem. Intern. Law. Part II. § 78, et seq. CALVO. Droit Int. Vol. I. § 236, et seq. PHILLIMORE. Com. on Int. Law. Vol. IV. § 2. WESTLAKE. Private Int. Law. Introduction. ASSER. Droit Int. et Droit Uniform. *Revue de Droit Int. et de Législation comparée.* 1880. *p.* 1–22. "In that region which is sometimes called Private International Law, and sometimes the Conflict of Laws, due as it is to the intercourse with each other of the citizens of different States, whether brought about through travel, commerce, continued residence, or even colonization, there has been increasingly felt the same pressing need to discover principles of utility and of justice, to which the citizens of a variety of States and the tribunals of all States will pay difference. The discovery of such principles to be successful, must rest upon a scientific investigation of the grounds, logical, social and political upon which all laws rest. Apart from such an investigation, the attempt, in any given country, to reconcile what is called the Conflict of Laws will always be exposed to the danger of favouring the interests or the prejudices of the citizens of the State where the law is applied. Thereby springs up, as has sprung up, an indefinite diversity in the private International Law of each State in the place of an identity of principle and practice, reflecting the identity of their moral claims." PROF. SHELDON AMOS. The Science of Law. Edit. HENRY S. KING & Co. 1874. p. 12.

concerned with the private rights and relations of individuals. It differs from Territorial or Municipal Law, in that it may allow the law of another territory to be the rule of judgment in preference to the law of that territory in which the case is tried. It is *International*, because, with a certain degree of harmony, Christian States have come to adopt the same principles in judicial decisions, where different Municipal Laws clash. It is called *Law*, just as Public International Law is called, not as imposed by a superior, but as a rule of action freely adopted by the Sovereign Power of a country, either in consideration of its being so adopted by other countries, or of its essential justice. And this adoption may have taken place through express law, giving direction to Courts or through power lodged in the Courts themselves." *

From these remarks regarding the nature of this Law, the following definition may be derived. Private International Law is the term under which are collectively comprehended those rules and principles through which the Conflict of Laws, arising out of certain juridical actions and transactions of aliens and non-domiciled subjects, is decided, and which, in general, solve the question as to *which law* is to govern those cases of actions or transactions which come under the operation of more than one code of Municipal Legislation or Jurisdiction.

Difference between Private International Law and Comity.

There is a difference between Private International Law and what is termed Comity, though both originate in the good will, convenience or policy of Nations, deeming it advisable to grant to each other privileges which are not reciprocally due between States and thus not *stricti juris*.

* WOOLSEY. Int. Law. Edit. 1879. § 73.

Comity, in a stricter sense, is the reciprocal exercise of politeness between Governments of States, and has regard to matters of mere courtesy, based on the general principle of the Right of Respect (§ 29), or it comprehends some special voluntary acts, not due by treaty, which may serve to facilitate the interests of internal policy of either party. To the latter category belongs also any privilege granted regarding direct and special correspondence between the respective Governments (§ 44), whilst Private International Law includes modes of legal proceedings in the application of foreign laws, as adopted by Legislative Jurisprudence or by the Jurisdiction of the Law Courts, without any direct interference of the executive Government, unless when established by special agreement between the respective States. In this sense Private International Law may be called the Comity of Law Courts, whilst Comity itself is the *droit de convenance* between Governments.

Locus regit actum.

The fundamental Rule of Private International Law is formulated in the words *Locus regit actum*, which lay down that, as a general principle, all acts, contracts, deeds and conveyances of rights or properties, judgments, marriages and divorces, testaments and all actions and transactions in a Court of Justice or out of Court, when regularly done or executed according to the laws and formalities of a Civilized State, are valid, in form and substance, in another State; with this derogatory provision, however, by which Private International Law as well as Comity are limited, and which devolves from the right of self-preservation, viz., that no State is required to recognize the laws of a foreign State when they work injustice to its own subjects or are in direct contravention of

any positive law, or of the established usages or morals of the country concerned.

Sources of Private International Law.

The following are the sources of Private International Law:—

1st. Civil Codes in which express provisions on the subject of this branch of Law have been incorporated. Of these the Civil Code of the Kingdom of Italy, as promulgated in 1865, [*Disposizioni sulla Publicazione, Interpretazione ed Applicazione delle Leggi in generalle, Art. 6-12*], is at present most conspicuous for its true appreciation of the progress achieved in this branch of Law.

2nd. Commercial Codes and Laws *(lex mercatoria).*

3rd. Maritime Laws.

4th. Established Usage.

5th. Decisions of Law Courts on questions of Conflicts of Law.

6th. Writers on Private International Law.

Subject-matter of Private International Law treated in this Chapter.

The following pages contain a sketch of the rules derived from these sources, and include:

a. The personal status or jural capacity of aliens with regard to possession of property, alienation and transfer of the same: with regard to succession to property by inheritance, and with regard to equality of legal capacity with citizens *(Political Nationality. Lex domicilii.* § 51). [*Res Judicata.* § 85].

b. The competency of Foreign Law Courts, the *(lex fori)* (§ 52).

c. The validity of marriages and divorces concluded or obtained in a foreign country *(lex loci regit actum.* § 53).

d. Rights and properties, *real* and *personal*, (*Lex rei sitæ. Lex domicilii.* § 54).

e. Transactions and obligations contracted under foreign law (*Lex loci contractus.* § 55).

f. Limitation and Prescription (§ 56).

g. Validity of will made in foreign countries (*Locus regit actum. Lex domicilii.* § 57).

h. Mercantile and Maritime Law (*Lex mercatoria.* §§ 58–78).

i. Laws of bankruptcy. Certificates of discharge and foreign curators or assignees (§§ 79–84).

j. The effect of sentences and judgments of foreign Law Courts in the Court of the domicile of parties. Proofs of foreign laws, of foreign decisions and foreign legal instruments (*Commission Rogatoire. Lex fori. Exceptio rei judicatæ. Lex loci executionis.* §§ 85–87).

It is obvious that the limited space of this work does not allow of more than a brief summary of the principal subjects of this branch of the science of law, which, like Public International Law, developing with civilization, is slowly but steadily growing into a system of rules, necessarily adopted to provide for the requirements of the ever increasing intercourse between Nations.

Works on Private International Law.

Out of the manifold legal questions arising from Conflict of Laws in which the subjects or citizens of different States, in their ever expanding mutual intercourse, are reciprocally interested, a branch of jurisprudence has sprung up, which is gradually forming itself into a completely separate department of science, having its own text-books and literature, so that the study of Private International Law involves the examination of the

various special works treating this particular branch of the general Law of Nations. * To these works we must refer the reader for a complete study of the rules prevailing in the Law Courts of the States of Europe and America, which constitute the principles of Private International Law, as adopted through comity, common utility or equity, in the different Municipal Codes or by usage in the forms or modes of procedures of the Law Courts of the various civilized Nations.

The space available for the subject matter treated in the several paragraphs of this chapter requires that we should limit ourselves to a brief sketch of these rules. These paragraphs do not pretend therefore to furnish perfect guidance in any given case, but merely to serve as finger-posts indicating the main course to be pursued; yet they will give the reader an idea as to what may reasonably be expected from the Comity of Nations in the present state of intercourse and civilization.

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* The following are the principal Works on Private International Law:—J. WESTLAKE. Treatise on Priv. Int. Law. London, 1858. FŒLIX. Traité de Droit Int. Privé, 4th Edition; by Charles Demangeat Paris, 1866. 2 Vols. MASSÉ. Le Droit Commercial dans ses rapports avec le Droit des Gens et le Droit Civil. Paris, 1874, 3rd Ed. Vol. II. Sir ROBERT PHILLIMORE. The *fourth volume* of his *Comm. on Intern. Law* (London, 1874), is a complefe text book on Private International Law and Comity. STORY. Commentaries on the Conflict of Laws Foreign and Domestic. 7th Edit. Boston, 1872. Von SAVIGNI. System des heutigen Römischen Rechts, 1849. Vol. VIII. F. LAURANT. Le Droit Civil International. Gand, 1882. DR. L. VON BAR. Das Internationale Privat-und Strafrecht. The edition of 1862 is translated into English with notes by G. R. Gillespie, B.A., 1883. R. DE MOHL. Geschichte und Literatur der Staatswissenschaften. Vol. I, contains criticisms on works on Public and Private International Law. PASQUALE FIORE. Diritto Internationale Privato. 2nd Edition, 1874. Translated into French by Pradier-Fodéré. Paris, 1875. J. A. FOOTE. Treatise on Private International Jurisprudence. J. M. C. ASSER. "Schets van het Internationaal Privaatrecht." Haarlem, 1880. *Revue de Droit International et de Législation Comparée*, a bi-monthly periodical, published at Brussels, Leipzig, The Hague and Paris, by Messrs. Asser, Westlake, Arntz, Alphonse Rivier and Ernest Nys. The first number appeared in 1869. *Journal du Droit International Privé*, published by Mr. Ed. Clunet in Paris.

In treating the Maritime and Commercial Laws, especially with regard to the *lex mercatoria*, we have, besides noting the respective features of Conflict of Laws, endeavoured to compile from different acts of legislation, those rules which appear to be the most available in cases of concurrent Jurisdiction which may occur between different resident Consular representatives or between the Local Authorities and a Consul, especially in Colonial Territories (Chapters XV and XVI).

II.—*Personal Status.*

Personal Status. Statuta Personalia).

§ 51. The Personal Status of an individual is determined by his legal condition with regard to birth, age, affinity and civil capacity, as regulated by the Laws of Statuta Personalia *(jus personarum)* of the State in which he shares Political Nationality and to which he owes allegiance as subject or citizen, whether original or naturalized. These Statuta Personalia, as noted above (§ 39), follow the individual wherever he may be domiciled.

When there is any doubt or uncertainty with regard to the Political Nationality of an individual, his personal status is determined by the laws of his legal domicile *(lex domicilii)*. In a Union of States, the law of the State, to which the individual belongs, governs his personal status, when there is no general law regulating the Statuta Personalia for the whole Union.*

The personal status of an individual being subject to the control of the legislature of his Political Nationality, it follows that, by changing his nationality, through naturalisation, he subjects

* Resolution of the Institut de Droit International, at their session, held at Geneva in September, 1874, on the Report of Professor MANCINI (Italian) and ASSER (Dutch). Revue de Droit International, etc., Vol. VII, 1875. page 329, and seq.

his personal status to the control of the laws of his new allegiance. All legal transactions, deeds and acts are judged by the actual personal status or legal capacity under which they were performed.

The following are the legal features of the personal status or jural capacity: —

1st. Nationality or Citizenship.

2nd. Legitimate or illegitimate birth, *i.e.* birth from legally married or unmarried parents. In the first instance the nationality of the father decides the citizenship, in the latter that of the mother. Foundlings follow the nationality of those who adopt them. Personal status, with regard to legitimate or illegitimate birth, decides questions as to acquiring and transmitting the right of inheritance of intestate property, that is, when inheritance or transmitting of property is regulated by affinity *(successio abintestato)*. The law which, at the time of the birth of a child, governs the matrimonial status of the parents, is, *per se*, the law which decides the legitimacy of the birth. The legitimation of an illegitimate child is regulated by the law governing the father's Political Nationality at the time the legitimation takes place.*

3rd. State of Minority or of Age. In the former state the individual is under guardianship until the legal age. When of age, the individual has reached the term of life fixed by law for his assuming responsibility in matter of civil acts and transactions.

4th. The State of insanity or idiotism, also requiring a guardian, regulated by Law.

5th. Marriage, the principal contract of Natural and Civil Law.

* VON SAVIGNY. § 338, et seqq. ASSER. Sketch of Pr. Int. Law, page 89.

6th. Divorce, the dissolution of the state of marriage.

Personal status, with regard to citizenship and capacity of civil acts and transactions, is also applicable to corporations, which follow, in this respect, the laws of the State under whose jurisdiction they are originally established (§ 58).

Until the middle of the last century, the exclusion of aliens from equal participation in the rights of protection by the territorial laws, and often at the bar of common justice, was predominant in Europe. The aliens of every State had to submit to all kinds of spoliation of their property for the benefit of the lord of the soil, to whose protection they had no established claim. Relics of these legal means of subjecting aliens to extortion, are still lingering in different forms, though mostly obsolete, in a few European laws, and serve the historian as examples to point out the progress which civilization and justice have made through the intercourse of Nations. The following is a brief statement of a few of these fiscal rights of the past, viz.:—

1st. The *Droit d'Aubaine (jus albinagii)* * belongs to the fiscal laws of feudal system, which gave the Sovereign a right over all the moveable and immoveable property of an alien after his death, to the exclusion of the testamentary and

* DU CANGE (*Gloss. Med. Æci.* voce *Albinagium et Albini*) derives the term from *adranæ*. Others derive it from *alibinatus*. During the Middle Ages the Scots were called "*Albani*" in France, from the Gothic term *Albanach*, which is still used in the highlands of Scotland, just as, in the present time, the term "*Francos*" or "*Francs*" is used in the Levant, to designate other western nationalities as well as the French. The term *Albani* may have been used on the Continent, in those times, to denote foreigners in general, as well as the Scots, under which nationality probably all were classed who came across from the British Islands. WHEATON. Elem. of Intern. Law. Ed. Dana. Vol. II. § 82. MARTENS. Précis de Droit Intern. Ed. Vergé. Vol. I. § 154. KLUBER. Droit des Gens de l'Europe. Ed. Ott. § 82, etc.

conventional as well as the ab-intestate foreign heirs.

2nd. The *Droit de Detraction* or *Droit de Rétraite (jus detractus)*, also sometimes called *Droit de Gabelle*, was the right of levying a tax of a certain percentage on moveable property of foreigners leaving the country.

3rd. Another sort of so-called right, belonging to the barbarous ages, was the *Droit de Naufrage* or *Droit d'Epave (Strandrecht, compendium naufragiorum)* by which, contrary to the natural law of property, all goods which were cast on the shores of a State, through shipwreck, jetison of cargo, or any accident of nature, were taken possession of by the inhabitants of the coast or by the Government of the State.

Personal status of the Foreigner, in the time of Grotius.

With regard to the amelioration of the condition of aliens in his time, Grotius gives the following statement in his work on Dutch Jurisprudence:—

"From the place of birth comes the distinction by which in this country (the Netherlands) some are considered natives and others foreigners, terms which require no elucidation. This distinction entailed, in former years, important consequences, because the property of foreigners, dying here, fell to the Crown. Foreigners were not admitted as competent witnesses against natives. In case of their murder or of other injury being inflicted on them, a lesser punishment was awarded than if the same had been committed against a native. In like manner all foreigners were by various edicts excluded from offices or rank. But in course of time, these countries having greatly advanced in trade and commerce by the influx of foreigners, so wide a distinction was found to be disadvantageous;

consequently, foreigners at this day leave and take an inheritance the same as the natives. They have also in all legal processes the same right as the inhabitants, nay, more; they have the stranger's plea, that is, when one of the litigants is a stranger, not holding his domicile here, his cause is more speedily entertained than a citizen's plea." *

As these privileges were granted on the principle of reciprocity, the above description gives a fair idea of the progress of Comity among the nations of Europe, from the Middle Ages to the time of Grotius.

Personal status of Domiciled Foreigners under the present state of International Law.

At present the maxims of modern International Law admit no inequality in legal capacity between domiciled foreigners and citizens, that is in the capacity to acquire all *civil* rights, with the exception of those directly emanating from the status of Political Nationality, more specially called Political Rights. The granting of this privilege of equality of legal capacity to foreigners temporarily residing in the State, however, is often regarded as a special prerogative of the Law Courts.

Domiciled Foreigners. The legal domicile of an individual, as noted above, is the place of his principal abode and chief seat of his affairs, established with intention to remain there, whereby he makes himself permanently subject to the laws of the place from which he acquires the Nationality of Domicile (§ 40). The definition of what is understood by legal domicile in a case of litigation belongs to the *lex fori* (§ 52).

Litigation between temporary

The rules under which the tribunal of the State will take cognisance, for purposes of

* HUGO GROTIUS. Introduction to Dutch Jurisprudence. Book I. Chapter XIII. Sections I–III. Translation by Charles Herbert. London, 1845. Page 52.

enforcement, protection or remedy, of the rights, duties, acts and obligations of foreigners, permanently residing in the State, are the same as those for the nationals or citizens. The *lex fori* decides whether suits between foreigners, who are but temporary residents, are maintainable before its tribunals. Suits between non-domiciled foreigners, which come before the tribunal of a State, must be personal suits or connected with contract obligations, to be executed, partly or wholly, at the place where the parties have entered into litigation. Thus a company of travelling actors can have differences with regard to their mutual contract obligations settled before the competent tribunal of the foreign State where they are temporarily residing, during their professional tour, provided these differences have regard to or are connected with the professional or travelling clauses of the contract. In such cases the Court will decide in comformity with the *lex loci contractus*, where this is admissible.

Suits with regard to properties outside the State.

The jurisdiction of a State cannot extend so as to absolutely bind property situated in a foreign country. For although the person may be within the jurisdiction, says Story, "yet it is by no means true that, in virtue thereof, every sort of suit may be maintainable against him. A suit cannot, for instance, be maintainable against him so as to bind personal property situated elsewhere and *à fortiori* neither to bind the rights and titles to immovable property."

"The jurisdiction of a State over all real property within its territory," says Halleck, "results as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ* (§ 54). As every thing relating to the tenure, title, transfer, descent and testamentary disposition of real property is regulated by the local

law, so also all proceedings in Courts of Justice relating to that species of property, such as the rules of evidence, the forms of action and pleadings and rules of decision, must necessarily be governed by the same law. This jurisdiction is exclusive. Every attempt of a foreign tribunal to found jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decrees incapable of execution *in rem*. It is true that the ownership of property within a country does not make the owner generally a subject of the State where it is locally situated, but it subjects him to its jurisdiction "*secundum quid, et aliquo modo*" (comp. §§ 52, 54 & 60).

"Mixed actions, so far as they regard the reality, are to be brought in the place *rei sitæ*, but if the personal damages or claims be separable in their nature and character, they may be sued for as personal actions." *

The result of these observations is this, that personal actions may be brought in any place where the defendant in the case can be found, that real actions must be brought in the *forum rei sitæ*, and that mixed actions, which are deemed local, are properly referrable to the same tribunals.

Personal status of domiciled Foreigners, in the United States of America.

With regard to the law of the United States of America, Timothy Walker says, "The law which determines the capacity, state, and condition of persons, is called personal law, as to which there is no universal rule admitted by all nations. But the rule prevailing in this country is, that, as to acts done, rights acquired, and obligations incurred in the place of domicile, the law of such domicile will govern everywhere; but, otherwise, the law of the place of the transaction will govern. This general rule will determine the capacities

* HALLECK. Intern. Law. Edit. 1878. Vol. I, p. 171. STORY. Conflict of Laws. §§ 537–555.

and incapacities, incident to infancy, coverture, idiocy, and lunacy, and all other personal abilities and disabilities, founded on the law of nature, and not on derogation of common right. But foreign Nations will not regard disqualifications created by penal laws, unless there be some express compact on the subject, like that existing between the States of this Union. Moreover, each Nation may make an exception to the above rule with respect to its own subjects; for as to them there can be no question of Comity, and, therefore, they will not be permitted to evade their own law, by resorting to countries where a different law prevails."

"In the common acceptation, domicile means the place where a person resides; but in a legal sense domicile means the place where a person has his fixed and permanent home or establishment. Two things must concur to constitute domicile, namely, actual residence, and the intention of remaining; or, in case of temporary absence, the intention of returning; and as there must be this concurrence of fact and intention, the question of domicile is often a difficult one. The most general rules on the subject are these. The place where one is born is his domicile, if it was the domicile of his parents; if not, their domicile is his, during minority, unless changed by the parents. A married woman has the domicile of her husband. Residence is *primâ facie* evidence of domicile; but no length of time is essential; and, therefore, if an adult person removes to a new residence, with the intention of remaining, it becomes his domicile immediately. The place where the family of a married man reside is considered his domicile, though he may do business in another place; and if the family have different places of residence for different

periods of the year, that place will be the domicile in which the head of the family exercises the rights of citizenship; but the domicile of a single man is usually the place where he transacts his permanent business. Every person must have a domicile somewhere, and therefore, when a domicile has once been acquired, it continues until a new one is acquired. These are the leading rules of local domicile, and they apply, for the most part, to national domicile. When a person has acquired a foreign domicile, and abandons it to return to his native domicile, the latter is reacquired the moment the former is left. It will thus be seen that domicile and citizenship have no necessary connection. Our citizens may have their domicile abroad; and aliens may have their domicile here." *

III *The Lex Fori.*

Competency of Foreign Law Courts.

§ 52. The term *lex fori* comprehends the territorial laws as well as the rules of examination, instruction, proceeding and judgment of judicial questions of the Court before which a case is brought for adjudication. These rules, etc. are divided into two categories, called *judiciorum ordinatoria* and *litis decisoria* (the *formes ordinatoires* and *décisoires.*)

The term Ordinatoria is applied strictly to forms of procedure, *i. e.*, the rules prescribed for the proceedings to be taken in order to arrive at the point where a legal decision may be given, but which rules have no direct influence on the matter at issue or the decision itself. Under the category of Decisoria are classed all proceedings and remedies which bear on the merits of the case and which influence the final decision.

* TIMOTHY WALKER. Introduction to American Law. Edit. 1874, p. 753.

The *ordinatoria* are regarded as inseparable from the *lex fori*, being the rules of the Court which must be followed, as on them depends the legal competency of the Court, and they cannot, in consequence, be governed by any foreign law, whilst the *decisoria* are subject to Conflict of Laws. In some cases it is, however, not easy to decide when a certain proceeding belongs to the Ordinatoria or the Decisoria class of rules. This is particularly to be observed in case of limitation and prescription, as will be noted hereafter (§ 56). *

As under the appellation *lex fori* all enactments and regulations, having legal force as municipal laws of the State, are comprehended, so also those International Treaties, sanctioned by the respective legislatures, by which certain rules with regard to jurisdiction are agreed on, are likewise classed under *lex fori.*

The execution or effect of those treaty stipulations which belong to the category of the *lex fori* enter, without reserve, into the judicial attributes; like any other law points, they are subject to the decision of the competent judge only, without interference of any Administrative or Political Power. †

The *lex fori* decides also when differences arise in a case in litigation with regard to the

* For a clear distinction between the *Ordinatoria* and the *Decisoria* rules, see MASSÉ, *Le Droit Commercial dans ses rapports avec le droit des gens et le droit civil.* II. *p.* 33. See also the extensive report submitted to the *Institut de Droit International* by PROF. ASSER, a member of the *Institut*, with regard to Conflicts of Civil Process Laws, published in the *Revue de Droit Internal.* Vol. VII. 1875, p. 364 et seq.

† "Les règles de Droit International Privé qui entrent dans les lois d'un pays *(lex fori)* par suite d'un traité international seront appliqués par les tribunaux, sans qu'il y ait une obligation internationale de la part du Gouvernement de veiller à cette application par la voie administrative." *Résolution of the Institut de Droit Intern. The Hague, 1875, Annuaire 1877, p. 81–90.* ASSER. Sketch of Priv. Intern. Law, T. I. p. 101. IDEM. Revue de Droit Intern. 1869, p. 476.

legal domicile of wives, widows, minors, students, lunatics, servants, public officers, military and naval officers, ecclesiastics, prisoners, exiles, immigrants, and corporations; it decides also, if a person has more than one domicile, which is the principal legal one, in cases which have regard to testaments, as distributions under intestacy, and other particular rights.

Questions regarding the domicile of Ambassadors, Consuls or other diplomatic or foreign Agents, belong to the provision of the Public International Law but are regarded in several States as forming part of the *lex fori*.

In proceedings *in rem*, respecting personal property *(mobilia)* within the territory of the State, the foreign *lex domicilii* may furnish the rule of decision, but the forms of process, the rules of evidence and limitation or prescription, are governed by the *lex fori* of the State.

IV *Marriage and Divorce.*

Marriage and Divorce (lex loci regit actum).

§ 53. The validity of a Marriage is generally admitted to be decided by the laws and formalities of the place where the marriage act is concluded *(lex loci regit actum)*, provided the rules of the personal status of parties have not been violated, that is to say, those provisions of the laws of their respective native State which are peremptory for the validity of marriage contracts, viz.: consent of parents or guardians (in cases of minors), capacity with regard to age and degree of consanguinity of parties, the required publication of banns, the solemnization of the marriage before the required witnesses or other publicity given to the act.

Most States in Europe and America have recognized by their legislative acts the validity of foreign marriages, acting on the principle of

lex loci regit actum, but establishing at the same time, the indispensable conditions on which alone marriages under foreign jurisdiction are valid in the native State.

Nuptial Contracts.

More occasion for Conflict of Laws is presented by the nuptial contract, or rather by the consequences of the contract of marriage with regard to property situated in foreign States. The general rule is that, while the personal capacity for contracting marriage, such as age, consent of parents, etc., is regulated by the laws of the Political Nationality, and while the formalities and validity of the contract are regulated by the *lex loci*, the effect of the nuptial contract, in the case of personal property, is governed by the *lex domicilii*, but in the case of immovable property (real property) situated in another State, the effect of nuptial contract is governed by the law of that State in which the property is situated, on the principle of *lex loci rei sitæ* (§ 54). *

Foreign Divorces.

Foreign divorces are now, in Europe and America, generally recognized when obtained by the laws of the place in which the parties were *bonâ fide* permanently domiciled. But when the parties expressly remove to another country, in order to evade the laws of the State to which the parties belong, either for causes not allowed by the laws of their domicile or in cases where those laws do not permit a divorce *â vinculo* for any cause whatever, such action is regarded as fraudulent and void. †

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* STORY. Conflict of Law. § 124. REDFIELD'S Note. No. 5. WOOLSEY. Introd. Int. Law. § 74. HALLECK. Int. Law. Vol. I, p. 157. MERLIN. Repertoire. Tit. Loi. § 6.

† WHEATON. Elem. of Intern. Law. Part II. §§ 92–151. *Idem. Dana's* Note, No. 46 on § 81. CALVO. Droit Intern. Vol. I. § 247. HALLECK. Intern. Law. Vol. I. Chapt. VII. §§ 10–11. PHILLIMORE. Comm. Intern. Law. Vol. IV. Priv. Intern. Law. Edit. 1874. Chapt. XIX–XXIII. FERGUSON. On Marriage and Divorce, Vol. I. § 18. STORY. Conflict of Laws. §§ 108–230.

Husband and Wife.

Husband and Wife. With regard to marriage and divorce in conformity with the law of the United States of America, Timothy Walker makes the following statements. "The general rule is, that the validity of a marriage depends upon the law of the place where it is celebrated. If valid there, it is valid everywhere; and if invalid there, it is invalid everywhere. The reason of this rule is found in the disastrous consequences which would follow from any other doctrine; and so strong is this reason, that the rule prevails even when persons have gone to a foreign country to marry, for the express purpose of evading the domestic law. The exceptions are with respect to incestuous marriages and polygamy; which, though lawful where they take place, are not recognized elsewhere. Some Nations also expressly prohibit their own subjects from marrying anywhere, unless according to their own laws, and, therefore, will not recognize other marriages. And the necessity of the case sometimes requires a resort to the law of the domicile, for want of a local law suited to the condition of the parties. With respect to the property acquired by marriage, the rule, so far as any is settled, seems to be this. When there is no change of domicile, the law of the place of the marriage will determine the rights of the parties as to personality everywhere; but their rights as to realty will depend upon the law of the place, where it is situated. When there is a change of domicile after marriage, the law of the new domicile will govern future acquired personalty everywhere, but realty will still depend upon the law of the place. In either case, however, if there be a special contract on the subject of property, that contract will everywhere govern personalty, and to some extent realty. Finally, when parties marry in one place with the inten-

tion of immediately settling in another, the law of the latter will govern their rights, because they are presumed to marry with that understanding. As to divorces, the rule is, that a divorce lawfully obtained in the place where the parties were married and had their domicile, will be valid everywhere. It has also been held in this country, that if the parties have changed their domicile after marriage, a divorce granted in their new domicile, for a cause occurring there, is valid everywhere, even in States where that cause would not have authorized a divorce. But when a party goes to another State for the express purpose of procuring a divorce, which he could not procure at home, such divorce, being in fraud of the law of the domicile, will not be recognized there. Whether it would be recognized elsewhere, is an unsettled question. It is also held in this country, that, in determining what cause shall be sufficient for a divorce, the law of the forum and not of the marriage is to govern; and that one State will not grant a divorce for a cause which occurred in another, unless there be express legislation to that effect." *

Parent and Child. The only important question under this head is that of legitimacy, which is generally determined by the law of the place of the marriage. If by that law the issue be legitimate, they will be held legitimate everywhere else, at least with respect to heirship. But the converse is not always true. † *Parent and Child.*

The purely personal relations between parent and lawful children are to be ruled by the *lex domicilii* of the parties, in the same way as the personal relations of the spouses and under the same limitation.

* TIMOTHY WALKER. Introduction to American Law, page 754 *et seq.*

† IDEM. *l. c.*

Guardian and Ward.

Guardian and Ward. With regard to foreign guardian-ship, Mr. Gillespie, in his note on § 106 of Prof. Bar's work, gives the following clear and all-comprehending statement. "The general principles of International Law, which regulate the recognition of the appointment and administration of foreign guardians, are identical, whether the incapacity that gives rise to the guardianship is due to incomplete age, mental weakness or disease, or prodigality. These three kinds of incapacity may be considered together, since the *incapax* from any of the three causes falls into the same legal position, and the rules of law in different countries are the same in all of the three cases."

"The principle that the interest of the *incapax* is the first thing to be considered has regulated the practice as to the appointment of guardians in America and Continental countries, and has now been adopted in England also, except where real estate is concerned. Thus, in France a foreigner will not be excluded from the family council, nor from the office of tutor, merely because he is a foreigner, if he is otherwise suitable for the office (Dunn v. Dupuis, 1st May, 1879, Trib. Civ. de Versailles); a foreign father may be appointed tutor to his son, who is a French subject, if that is most convenient for the interests of the child (Bourchy v. Antoine, Trib. de Briey, 24th Jan. 1878); and a foreigner resident in Louisiana has been nominated to be the tutor of his children by the Courts of the State (1874, Succession Guillemin, 2 A. 634). The Belgian Courts have refused to appoint a foreigner to the office of tutor (Prince of Rhein-a-Welbeck v. Comte de Berlaimont, Trib. de Namur, 12th August 1872); but this decision is pronounced by the reporter to be of doubtful

soundness. The Scotch Courts have refused, on grounds of expediency, to appoint persons out of their jurisdiction to be tutors or curators; but they will recognise the appointments of foreign Courts to such offices, except where real estate forms the subject which is to be administered."

"It is no doubt the influence of the maxim, that the interest of the *incapax* must be the leading consideration for the Court, that has induced the Courts of the Continent,—in countries where nationality and not domicile is generally accepted as founding jurisdiction,—to exercise a protective jurisdiction, *ratione domicilii*, in cases of incapacity, and appoint guardians to persons who are of foreign nationality, and have no more than a domicile, or it may be in some cases merely a residence, within the territory of the Court. The French law allows a French citizen to change his domicile without changing his nationality, to the effect of submitting the tutory of his children to a foreign law. So, too, a Frenchwoman who has been married to a foreigner, but has on her widowhood returned to France and recovered her French nationality, may be appointed tutrix to her children who are resident with her in France, although their nationality will be that of their father. The appointment is made by the French Courts, and the rights and duties of the tutrix on the one hand, and the security given to the wards on the other, over her estate, are those which the law of France allows. This decision appears to proceed upon considerations of social order and public morality (Sokolowski, Bourges, 4th August, 1874). So, too, from similar considerations of the interest of the wards, in a case where the father of a family, himself a foreigner, was in jail in a foreign country, and his children, who were with

their mother in France, had been left unprotected by her death, the French Courts appointed a tutor, although no such step had been taken in their own country (De Nau, 10th April, 1877, Trib. Civ. de la Seine). The Courts of Belgium will place a foreigner, who is resident in Belgium, under curatory as a prodigal. 'The Court extends to foreigners the benefit of all the laws that have in view the protection of person or of property' (Cour d'Appel de Bruxelles, 9th June, 1873). This same jurisdiction, in a case of prodigality, has been exercised by the Italian Courts (Dulche v. Pirola, 1st July, 1872); and in the case of Stocher Kirkhope, decided by the Court of Appeal at Lucca, 1st September, 1875, the Court laid down that, in cases of incapacity in persons who were domiciled or resident in Italy, there was jurisdiction in the Italian Courts to assume the administration of the affairs of the *incapax*, but only if the Courts of his own country could have exercised a similar jurisdiction in the circumstances that had occurred. In the case of interdiction on the ground of prodigality, the French Courts have followed a similar rule, laying down that a process of interdiction will be allowed to proceed in France, if it is just and advantageous for the interests of the *incapax*, that it should do so (May v. Sheppards, Cour de Caen, 20th January, 1873)."

"These were all cases where no competing appointment had been made for the protection of the *incapax* by the Court of any other country, and they have been cited for the purpose of showing, that the interests of the *incapax* are of such importance, that the Courts of the country where he is found will not hesitate to exercise a protective jurisdiction for his behoof. But on the Continent the status of guardianship once

validly constituted will be recognised, according to the *lex domicilii*, wherever the ward may go or wherever his property may be, and no distinction will be made between real and personal property. In Austria, for instance, the Courts have refused to sanction a sale of real property, situated there, belonging to minors who were of foreign nationality and domicile and under a foreign guardianship. The necessary authority must be obtained from the Court that is charged with their guardianship (Supreme Court of Austria, 4th January, 1870)."

"In so far as domicile is taken as the criterion of jurisdiction, the law of England and Scotland is in conformity with these cases, for domicile and not nationality is in all cases taken by it as founding jurisdiction. But the Courts of England and America stand alone in this, that they hold that if any person, being *incapax*, comes within their jurisdiction, they have power to take up the care of his person and the management of his affairs, although a foreign guardian has been already validly appointed. That they should have power, in cases of necessity, to interfere, on the ground of residence, without requiring a full domicile, is reasonable, and is sanctioned by the principles of the Continental decisions cited above, and the Courts of Scotland would, in pressing cases, hardly hesitate to make such an appointment *ad interim*. But the law of Scotland recognises, in so far as the custody of the person and the management of the personal estate are concerned, the appointment by a foreign Court, without requiring any new appointment to be made or the old one to be confirmed. In England, however, and in America the Courts maintain their rights of jurisdiction over all such persons within their territory, and have exercised

them in such cases as Johnstone v. Beathe, 10 Cl. and Fin. 42. But in more recent times, the Courts of England have receded from this extreme position, and their attitude as described by Mr. Westlake is this:—"As regards the custody of the person of an *incapax*, now at last the English Court, in appointing a guardian or committee of the person, will support the authority of the guardian or committee existing under the personal law or jurisdiction, and not defeat it unless it should be abused." He refers to cases in point (cf. also Wharton, § 263 et seq.) "As regards the estate, the foreign guardian can sue and give receipts for personal property belonging to his ward, and it will therefore seldom be necessary to appeal to the English Courts to make a new appointment for such purposes. The Courts of Scotland, in the case of lunatics as well as minors, will refuse to make any appointment in the face of one already made by a foreign Court, to control the person or the personal property (cf. Fraser, on Parent and Child, pp. 602 and 609)."

"In England, as in America, where real property is in question, the appointment will be made by the Court of the country, and the administration of that estate will be regulated by the law of the country where the real estate is situated. There is no question whatsoever, that, according to the doctrine of the common law, the rights of foreign guardians are not admitted over immovable property situated in other countries. These rights are deemed to be strictly territorial, and are not recognized as having any influence upon such property in other countries whose systems of jurisprudence embrace different regulations and require different duties and arrangements (Story, § 504)."

"On the Continent, the *lex domicilii* will regulate the guardianship over immovables just as over movables."

"In Scotland the law is thus stated by Lord Fraser (p. 605). The practice in Scotch Courts has been, for some time, to appoint a special guardian to Scotch heritage belonging to foreign wards; and the person so appointed will always be a Scotchman within the jurisdiction of the Court. In special circumstances the Courts have allowed a minor to nominate as his curator a person out of their jurisdiction, taking all possible precautions and exacting undertakings that the curator shall, in the matters of the curatory, submit to their jurisdiction; but very special circumstances require to be shown. Contrast the cases of Lord Macdonald (June 11, 1864, 2 M. 1194), where it was sanctioned, and Ferguson (January 25, 1870, 8 M. 426), where it was refused. But in regard to the administration of guardians for lunatics, as well as that of guardians for minors, the question is yet undicided whether the *lex domicilii* will be recognised as the law to which the guardian is bound to conform in his dealings with property situated in Scotland, belonging to a ward having a foreign domicile" (Fraser, Parent and Child p. 609). There are indications that the *lex domicilii* of the ward would be held to regulate these (Lamb, 20th July, 1858, 20 D. 1323); but on the other hand, it is difficult to suppose that an officer appointed by the Courts of Scotland should have wider or narrower powers, according as the ward was, by domicile, a foreigner of this or that country or domicile." *

* G. R. GILLESPIE. Note R. on § 106, Translation of Prof. von Bar's *Internationales Privat-und Strafrecht. Edit.* 1883, page 440 *et seq.*

V.—*Real and Movable Property.*

Real Property. § 54. As real or immovable property forms an integral part of the territory of the State, all transactions with regard to the acquisition and alienation of this class of property are regulated by the laws of the State wherein the property is situated, according to the *lex loci rei sitæ*, which governs the status of real property, exclusive of any foreign law or disposition among individuals, as to the tenure, the title and descent of such property.

Thus, with regard to the transfer of real property *inter vivos*, it is generally understood among Law Courts and Jurists, that the *lex loci rei sitæ* must determine the following points:—

1st. The conditions of the disposition of immovable property *(real estate)*.

2nd. The personal capacity to take or convey immovable property.

3rd. The formalities of transferring titles.

4th. The extent of the dominion over immovable property.

5th. The question what is and what is not real estate (§ 38). *

Personal Property Movable goods, called personal property, are now in most cases regarded as following the same rule as real property, that is, the law of the place where these goods are in actual use, deposited or registered, in conservation, pawned or in legal custody. However, the rule of *lex rei sitæ* has, with respect to movable property, many exceptions, when this property is regarded as attached to the person of the owner, and,

* REDFIELD'S edition of Story's Conflicts of Laws. Chapt. X. §§ 424-454.

when thus viewed, the rule that movable property follows the law of the owner's domicile *(mobilia sequuntur personam)* is yet often applied. Acts and deeds, with regard to this class of goods, are governed by the law of the domicile of the owner, *(lex domicilii)*.

Instruments relating to personal property are governed by the lex domicilii.

Thus the law of the place where the owner was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects, wherever they may be situated (Com. § 52).

In the same way the law of the place where any instrument, relating to movable (personal) property is made, by a party domiciled in that place, prevails with regard to external form, and with regard to the interpretation and the effect of the instrument *(locus regit actum)*. Thus a testament of personal property, if in accordance with the formalities required by the laws of the place where it is made, and where the party making it was domiciled at the time, is valid in every other country, and it is to be interpreted and given effect to according to the *lex loci* (Wheaton. Edit. Dana. § 83).

The term movable property is not always applied in the same sense by all legislatures. Such is the case with regard to vessels of the sea-going class, rents, Government debts, shares of public banks, canals, mines, rail roads, etc. To all these sorts of movable properties the character of real property is sometimes given by Municipal Laws, with permanent or personal or with transferable title-deeds attached, which then, by succession or alienation, must follow the respective Municipal regulations, *i. e.* the *lex loci rei sitæ*.

Litigation with regard to properties (real or personal) situated in a foreign country.

Litigation with regard to properties (real or personal) situated in a foreign country, has been noted in § 51, page 155.

VI.—*Legal Obligations and Contracts.*

Legal Obligations.

§ 55. The term obligation includes every moral or legal tie, which imposes the necessity of doing or abstaining from doing any act. Hence the distinction between *moral* or *natural obligations* (sometimes called *imperfect obligations*), which, although they have a definite object and are binding as a matter of conscience, cannot be enforced by legal remedy, and *legal obligations* which are the liabilities regulated by legislation.

Moral obligations, their origin and principal features, as forming the basis of International Law, have been treated in the first part of this work. The present observations have regard to legal obligations.

There are two sorts or classes of legal liability, viz., the responsibility which results from the voluntary undertaking of one individual in compact with another and is more particularly called Contract *(obligationes ex contractu)*, and the legal liability which originates from the personal acts of the individual, but unconnected with agreement, as being imposed by law *(obligationes ex lege)*. The latter may be of two kinds, lawful or unlawful, viz., from the personal lawful act flow the obligations called quasi-contracts *(quasi ex contractu)*; from the unlawful but unintentional act *(quasi ex delicto)* flow the obligations of repairing the injury, and from the unlawful and intentional act *(ex delicto)* flow the obligations of the wrong-doer to repair the injury, besides undergoing punishment for the delict. *

The obligations which are imposed by the law *(obligationes ex lege, quasi ex contractu, quasi ex*

* PHILLIMORE. Com. upon Intern. Law. Vol. IV. Ch. XXXII. CHITTY. (Jun). On Contracts. Ed. 1857, p. 1.

delicto and *ex-delicto)* seldom give occasion for Conflict of Law. They are subject to the law of the State, within whose jurisdiction the act (lawful or unlawful), which constitutes the primitive cause of the liability and entailed the obligation, has been committed or the situation which gave birth to the *obligatio ex lege* is created (§ 87). *

The Law of Contracts.

The following rules have regard to contracts *(obligationes ex contractu)* as the results of voluntary agreements, whereby one party binds himself or becomes bound, expressly or implicitly, to another, to do, or omit doing a certain definite act or to pay a sum of money. In these rules the intention of the contracting parties, expressed or presumed, serves to indicate which law is applicable in cases of conflicts of law.

1°. The place in which a contract is made is always presumed to be the place in which it is to be performed, unless some other place is named.

2°. Contracts made in conformity with the existing laws of a State are valid in other States, on the principle that an act valid by the law of the place where it is performed is valid every where else *(lex loci regit actum)*, that is, the law of that place decides in every thing respecting the form, interpretation, obligation and effect of the contract, wherever the authority, rights and interests of other States and their citizens are not thereby prejudiced. On the other hand, contracts, concluded in violation of the laws of the State where they are concluded, are, on the same principle, null and void in any other State.

3°. Contracts are not only void when they infringe upon the laws of the State where the agree-

* BAR. Das Internationale Privat und Strafrecht. §§ 87 & 88. PHILLIMORE. Com. Int. Law. Vol. IV. ASSER. Sketch of Private Int. Law. p. 64.

ment is made, but they are also held invalid, when called in question in a neutral Law Court, if made with a view to excite war or insurrection in a friendly State or to furnish military supplies, in violation of the obligations of the neutrality of the State where the contract is made; so also of a contract made in one State, contemplating a violation of the laws for the preservation of health, morals, and the credit of another State, and especially for those misdemeanors to the prejudice of a foreign State as can give rise to demand for extradition, in conformity with treaty rights. Obligations are not only void when anything is promised which is forbidden by the Municipal Law of the State where the contract is made, but also when anything is promised which is considered as disreputable by Natural Law, as being repugnant to morality or justice. *

4°. The law of the place where a contract is made *(lex loci contractus)* decides the intrinsic validity of the obligation or will, and the interpretation, but when it comes to the execution of the contract or will, it is the *lex fori* which decides the question, which may arise in the enforcement of the obligation.

The rule that the validity of a contract is to be decided by the law of the place where it is made *(lex loci contractus)*, called the law of Contracts, which governs every thing respecting the form, interpretation, obligation and effect of the contract, is founded on the necessity under which nations are to facilitate the carrying on of commercial intercourse with each other, for the whole system of agencies, purchases and sales, credit and negociable instruments, bills of ex-

* STORY. Confl. of Law. § 257. WESTLAKE. Priv. Int. Law. § 199. HEFFTER. Europ. Völker Recht, §§ 36–39. PHILLIMORE. Com. on Int. Law. Vol. IV. Ed. 1874. Chap. XXXII.

change etc., rests on the admittance of the validity of contracts made in a foreign State, with such exceptions only as are rendered necessary for the purpose of proper adjudication.

5°. Real acts are subject to the laws of the State in which the immovable property is situated; personal acts follow the same principle, with the exceptions stated above, and obligations are subject to the laws of the place where the contract is concluded, or where it is to be carried into effect, according to the intention of the parties interested. (Comp. § 51, page 155).

Exceptions from the rule of lex loci contractus.

The principle of *lex loci contractus* is departed from in the following instances:—

1st. There is a distinction to be made between what relates to the *validity*, the *interpretation* and the *execution* of a contract.

The validity of a contract is determined by the legal capacity of the parties to enter into agreements and by the legality of the formalities observed. These have regard to the *personal status* and to the principle of *locus regit actum*. The interpretation of a contract has regard to its obligation and consequences, and must be explained by the *lex loci contractus*, as it is understood that parties have submitted to the law of the place where the contract is made. When no express condition is made on this head, the execution is always governed by the *lex fori* of the place where the contract is to have effect. *

Whatever concerns the accomplishment of the engagements entered into by a contract, and its execution or remission, which proceedings are all subsequent to the passing of the document, all that is to be governed by the law of the place where the fulfilment of the contract, or the payment, is to take place. This law (the *lex fori*) de-

* P. Fiori, Dir. Int. Priv. p. 333 & 399.

termines the formalities of execution, deliverance and payment, the measurement of lands and movable objects conveyed, the sort and rate of exchange of the money in which the payment is to be effected, discharge for the payment, delay on protest, respite, prescription, damage, cost and interest of the same, in case of non-compliance, and all local regulations. * Thus the obligations of a contract are to be determined by the *lex loci contractus*, but the proceeding or remedy for enforcing it by the *lex fori*.

2nd. Contracts which are against good morals or public rights or against the laws or interest of the country in which the contract is to take effect, or against the private *bonâ fide* claims of any of its domiciled subjects or citizens, cannot be protected by the *lex loci contractus*. Nor does the latter apply when the contract entails proceedings against the safety or internal order of a friendly State, which would compromise the neutral country or the good harmony between the respective Governments.

3rd. When one of the parties refuses to comply with the contract, on the plea of *prescription* or by any dilatory exceptions, this must be judged by the *lex fori*, as the laws of the State, and the tribunal where the affair is brought forward, govern legal prescriptions and dilatory exceptions with regard to conventional engagements concluded in a foreign country. Of course, in such a case, it devolves on the *lex fori* to decide whether an exception is *dilatory* and thus affects the execution of the contract, or whether it is a *peremptory* one, disputing the validity of the contract; which latter case must be judged in conformity with the laws of the place of the origin of the contract, on the principle of *locus regit actum*,

* FŒLIX. Traité de Droit Int. Priv. Vol. I. p. 231–244.

for a contract, being void by the law of the place where it is made, is void *ab initio* and cannot be carried into effect in any other State (Comp. § 56).

4th. When the contract is made between parties of the same Nationality of Domicile in a foreign country where they have no domicile, the whole transaction must be judged by the law of *their* domicile, unless otherwise stipulated.

5th. Contracts between *absentees*, through *writing* or by *telegraphic* communications, must comply with the laws or usages of the respective places where the parties were residing at the time of the compact. If the contracts is couched in writing, the law of the place where the deed is dated, governs the action. If two or more places, with different laws, are concerned in the transaction, or in cases where there is no written contract, but simply a correspondence by letters between parties, then the law which gives the completest validity and legality to the transaction, must govern the contract.

6th. Contracts made in a foreign country by *non-domiciled* parties, with the object of eluding the laws of the Courts to which they are subject, are null and void, on the general principle that, when the primitive cause of an act is illegal or immoral, all agreements based thereon, or directly originating from the same, are illegal or founded on moral turpitude, and the contract appertaining thereto is consequently without validity. *

VII.—*Limitation and Prescription. Legal Remedies.*

Limitation and Prescription. Legal Remedies.

§ 56. Prescription is a rule of law by which obligations are ended, and titles of ownership

* BAR. § 37. 72 & 73. ASSER. Sketch of Priv. Int. Law. Page 40, etc. FŒLIX. § 97, et seq. WESTLAKE. Ch. 6 & 7. HALLECK, Edit. Sherston Baker. Vol. I. Ch. 7. § 5. STORY. Conflict of Laws. § 245—248. 280. 299. 301. CALVO. I. § 240.

created. It is therefore viewed in two different aspects, which are distinguished by the terms *limitation* and *prescription*.

The distinction between limitation and prescription consists in this, that the former is the rule limiting the time within which proceedings at law may be commenced, in order to enforce the performance of an act or the fulfilment of an obligation, while prescription, properly called *extentive prescription*, relates directly to the nature of the question. The one belongs to the rules of judicial proceedings as a question of procedure, relating to the remedy and not to the nature of the obligation, what is called *judiciorum ordinatoria (formes ordinatoires)*; whilst the other belongs to the *litis decisoria (formes décisoires)* which define the mutual juridical position of parties and relate to the decision of the question concerning the intrinsic validity by which the claim is upheld or extinguished, as noted above under the head of *lex fori* (§ 52).

Hence prescription is not only defensive like limitation, but also creative, as it can establish titles of ownership through recognizing possession, uninterruptedly continued for a certain time, as creative of title. (Comp. § 32).

"Limitation," says Mr. Bell (Commentaries on Scotch Laws), "is a denial of action on an instrument or document of debt after the lapse of a certain time, without regard to the actual subsistence of the debt. Thus barring the remedy without extinguishing the claim. Prescription, is a legal presumption of payment or abandonment of the debt. Limitation is either by convention, or by statute: the former being the condition in the obligation, the latter established on grounds of public expediency."

Mr. Dana makes the following remarks, in his note No. 92, on § 143 of Wheaton's Elements of International Law. "It is true that a statute of limitation indirectly operates upon title to property, and has the same effect in aid of the party such as a defensive prescription, and so it may be argued that they belong to the laws of property and not of mere remedy; but it is impossible in International Law to be governed by these indirect operations. The tribunal may simply decline to lend its aid to the plaintiff or actor, on the ground of domestic policy of repose prescribed by the Sovereign Power, and other nations cannot complain if no discrimination is made against their citizens. It has sometimes been said that the continental writers treat statutes of limitations as part of the law of property and obligations, and therefore not necessarily to be governed by the *lex fori*. Savigni and Fœlix have been adduced as instances. But any language that may be cited to that effect will be found to relate to prescription and not to mere rules of limitation. Rules of prescription relate directly to ownership or title in a thing and are part of the law of property."

"As all personal rights in things may be said to originate in occupancy, the Roman Law has recognized a possession, begun in a certain manner and continued for a certain time, as creative of a positive title. Such possession does not merely afford presumption of some act necessarily to create a title, as of original occupation of a thing unoccupied, or of a transfer from the previous owner, but it is itself a prescribed mode of lawful acquisition. For this reason, it was required to originate *bonâ fide* and *justo titulo*, that is to say, the possession must have been begun in an honest belief of a right, justified by apparently regular proceeding." (Comp. § 32).

Limitation, when considered as a law-remedy, belonging to the rules of judicial proceeding, or as a *beneficium fori*, must naturally be subject to the *lex fori*. But when viewed in the light of a material right of the debtor, which could as well have been considered at the outset of the transaction, and thus enter, as such, tacitly into the nature of the agreement or contract, it ought, of course, to be determined by the *lex loci contractus*, as it could be presumed that parties have submitted to the rules of limitation of the law under which the agreement was entered into, that is, the law of the place where the contract has been signed.

Prescription, which relates to acquisition of title and ownership, is governed by the law of the place where the thing is situated or the right acquired, the *lex rei sitæ* or the *lex domicilii*.*

VIII *Wills and Succession.*

Wills & Intestacy. § 57. Whilst contracts or other deeds with regard to the disposal of property during life time *(donationes inter vivos)*, are generally acknowledged by foreign Law Courts, on the principle that every individual, with the proper jural capacity, has the right to dispose freely of his goods for any purpose he thinks fit *(jus disponendi)*, the acts of a last will, that is, the manifestation of what a person wishes should be done concerning his estate after his death, sometimes suffer many difficulties in being recognized in foreign Courts. This is partly a consequence of the fact that testaments belong as well to the

* PHILLIMORE. Com. on Int. Law. Vol. IV. Edit. 1874. Chap. XL. p. 613, et seq. WHEATON. Elem. Int. Law. Edit. Dana. § 143. 164 & 165. STORY. Conflict of Laws. § 576–581. WESTLAKE. Priv. Int. Law. § 250–252. BELL. Comment. on Scotch Laws. Edit. Shaw, p. 76, et seq. ASSER. Sketch of Private Int. Law. FŒLIX. Traité de Droit Int. Priv. Vol. I. p. 241. VON SAVIGNI. System des heutigen Römischen Rechts. Liv. VII. § 243.

domain of civil and local laws as to that of personal status, and partly also it arises from the differences which formerly existed in the solution of the following questions. Is succession by testament based on Natural Law? Is testamentary acquisition of *jus possessionis* possible after the death of the owner, when by death all rights are extinct, the goods being really inalienated at the time of the death? The modern theory, however, that of Grotius, Puffendorf and Wolff prevails, namely, that where the right of disposing of one's property *(jus disponendi)* exists, there also exists the right to dispose of it by testament.*

With regard to wills which entail succession to property, the most generally adopted rules are the following. The *lex loci rei sitæ* decides the following points:—

1st. The validity of the bequest, that is the extent of the testator's power to dispose of the property *(jus disponendi)*.

2nd. The forms and solemnities necessary to give the will its due attestation and effect.

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* Grotius expresses his opinion on the right to bequeath property by last will in the following terms. "This right, having been confirmed by the laws of many nations, is not at variance with Natural Law, but on the contrary is altogether consistent with natural reason. For, as every one may, by deed, *(inter vivos,)* dispose of his property at his pleasure, either absolutely or conditionally, and the *jus dominii* being thus transferred, is valid even after the death of the party who transfers, so, in the course of time, it has become the practice for the proprietor to transfer some part of his property to another, reserving to himself the possession and use thereof, during his own life, or even to give over the possession, stipulating to reclaim the *jus dominii* at pleasure, during his own life, which is called *donatio mortis causa*. Thus subsequently and previously, it has been considered not unreasonable, that a person, who retains his own property for his own use during his life, should nominate whom he wishes to be owner of the same after his decease. But as this is very comprehensive, Municipal or Civil Law has strictly limited the powers of the citizens as well in favour of the nearest kin, especially the Children and Parents; and also provided against all fickleness of disposition and all fraud and cunning which could possibly be pratised contrary to a man's inclination. GROTIUS. Introd. to Dutch Jurisprudence. Book II. Chap. XIV. Sec. II. IDEM. De Jure Belli ac Pacis. Vol. I. Book II. Chap. VI. Section XIV.

The Law of the testator's domicile *(lex domicilii)* governs the following points.

1st. The question of his legal capacity to make a will:—

2nd. The construction of the will, as to whether it does pass real estate.

3rd. What is real estate when the will purports to pass it.

4th. The quantity or nature of estate in land.

5th. The *designatio personarum.*

6th. The import of ambiguous terms, that is, the interpretation of the will. Movable or personal property follows the *lex domicilii* of the last legal domicile of the testator, that is, the place where the estate is to be settled as having been the centre of the testator's business when alive. Real and immovable property follows the *lex rei sitæ* (§ 54).

As to the form of the will, the testator has the option to adopt either the law of the place where the will is to be executed, *i. e.*, the *lex domicilii*, or the laws of the place where the deed is made, the *lex loci actus.* The general maxim, however, remains that *locus regit actum.* *

Succession.

Succession is either testamentary or *ab intestato.* In the former case the heir succeeds to the deceased by his express will recorded in a testament *(testatio mentis)*, in the latter case the succession takes place by absence or illegality of the testament, in conformity with fixed rules of law.

The question, as to which law governs succession, must be answered in connection with the system or principle by which succession is regarded. If succession is treated according to the principles of the Roman Law, which is generally accepted

* DANA. Note No. 46, on § 81, of Wheaton. PHILLIMORE. Vol. IV. 1874, Chap. XLIII. VON SAVIGNI. Vol. VIII. § 381.

in most modern codes, succession is a continuation of the rights and obligations of the testator, by which the heir represents his predecessor in all legal questions relating to the estate, which is termed *sucessio per universitatem.* In this case the transmission of the legal person of the predecessor to the heir cannot take place, except according to the laws of succession prevailing at the domicile of the predecessor, where the settlement of the estate of the deceased takes place. But when succession is simply regarded as a mode of acquisition, and the law of succession is treated merely as a variety of the law of acquiring property, or when it is only the question of a legacy, then the *lex rei sitæ* must rule the conveyance of the property to the heir.

The form and validity of foreign wills of personal property, and foreign succession *ab intestato*, are decided through the *lex domicilii*, but the *lex fori* determines the formalities and proceedings to probate or homologate the will and the power of the foreign executor, or the authority of the administrator of a succession *ab intestato*, appointed *ex-officio* under foreign laws, to deal with the personal property of the succession, which, as a general rule, is to be distributed according to the *lex domicilii* of the deceased. This is the case, however, when no claims are brought against the estate by citizens of the country where the property is situated, for, when such claims are preferred, the distribution is made in conformity with the respective *lex fori.* *

Where Consular officers act as executors or administrators *ex-officio* of successions, the stipulations of the respective Consular Convention govern proceedings under this head.

* WHEATON. Elem. Int. Law. *Edit. Dana.* §§ 135–137.

American Laws. With regard to American Laws concerning foreign executors and administrators of wills, Timothy Walker makes the following statements. "By our statutes, authenticated copies of wills made and proved in any part of the world, according to the law of the place, are admitted to record here, and have the same effect as if made here. If a person die intestate out of this State (Ohio), leaving rights or credits here, administration may be granted here. If an executor or administrator be duly appointed within the United States, he may sue here, and may sell real estate here, in the same manner as if appointed here. But these latter provisions do not extend to foreign Nations; and, therefore, no foreign executor or administrator can sue or be sued, or otherwise judicially recognized here, by reason of this foreign appointment. New letters of administration must be taken out here according to our laws, and a settlement must be made of the assets found here; and all debts or legacies due here must be paid out of such assets, before anything is transmitted abroad, even though the estate were insolvent there. But the better opinion is, that he is not liable to be sued here for assets received abroad.

The next question relates to descent and distribution. With respect to real property, the rule is that the rights of dower, curtesy, and descent, depend exclusively upon the law of the place where it is situated. But with respect to personal property, the rule is, that it is to be distributed according to the law of the intestate's domicile, at the time of his death, wherever such property be situated. With respect to a will of personalty, the rule is, that, if made according to the law of the testator's actual domicile, it will pass personalty wherever it may be; but if

not made according to the law of the domicile, it is not valid anywhere. With respect to a will of realty, its validity and effect must depend wholly upon the law of the place where the property is." *

IX.—*The Lex Mercatoria.*

Commercial Laws Lex Mercatoria. (The Law Merchant).

§ 58. The established usages and customs of trade, collectively called *lex mercatoria (Droit de Commerce, Handelsrecht)*, forming what is more commonly known by the term *Mercantile Law* (the *Law-Merchant)*, is founded on the necessities of commerce and the natural rights and obligations, which, independently of Municipal Law, grow out of commercial intercourse. These are the materials from which are built up the various systems of Commercial Legislation, such as are embodied in the Commercial Codes of different States, in the British Merchant Shipping Act of 1854 and its Amendments by the Act of 1855 and by that of 1862, † in the Statutory Law on Joint Stock Companies, on Bankruptcy, and in other Commercial Common and Statute Law and judge-made law in commercial cases. ‡

These are the laws regarding traders and commercial acts, on traders' books, on commercial partnerships and companies, on commercial exchanges, brokers and bankers, on commission agents and forwarding agents *(expediteurs)*, on carriers and bargemen navigating inland rivers and canals; on bills of exchange; on engagements to pay; on promissory notes to order; on assignations and cheques; on negociable papers in commerce, banker's notes and paper payable at sight to bearer; on purchase and sale, and

* TIMOTHY WALKER. Introd. to American Law. Edit. Bryant Walker. 1874, p. 756.

† 17 & 18 Vict. c. 131; 18 & 19 Vict. c. 91. and 25 & 26 Vict. c. 91.

‡ LEONE LEVI. International Commercial Laws. Chapt. I.

reclaiming or revendication in matter of commerce (stoppage in transitu); on insurance; on rights and obligations resulting from navigation (Shipping Laws), viz., of sea-going vessels, of owners and managers, of ship's masters, of ship's officers and seamen, of affreighting and chartering of ships; on charter-parties and bills of lading; on passengers; on collision and fouling; on salvage, shipwreck, stranding and flotson; on jettison; on bottomry; on insurance against the dangers of sea; on abandonment; on averages; on prescription of contracts in maritime commerce; on bankruptcy and surcease of payment; on assignees or curators in bankruptcy. By this it is obvious that the *lex mercatoria* is the most important branch of Private International Law.

Positive Civil Law (§ 37) is applicable to commercial matters in so far as it is not deviated from by special Commercial Laws. Usages and customs of trade, being ingrafted upon Civil Law and made part of it, are allowed, for the benefit of trade, to be of prominent validity in all commercial transactions. *

In this and the following sections there will be noted some rules for the different circumstances in which the *lex mercatoria* is applicable. As every nationality, however, has its own *lex mercatoria*, though agreeing with those of other Commercial Nations on the main principles of general commercial usages, the rules given in §§ 59-84 of this chapter are to be regarded (as stated already in § 50), as mere indications how some instances of the *lex mercatoria* may be viewed in cases of Concurrent Jurisdiction (§ 49).

* BLACKSTONE'S. Comment. I. Introd. § 3. PHILLIMORE. Comment. on Intern. Law. Vol. IV. Chapt. XLI.

Traders are the subjects of the *lex mercatoria*, and Acts of Commerce are its objects.

Traders and Acts of Commerce.

Traders. The *lex mercatoria* considers those as traders who perform acts of commerce and whose habitual profession is trade. In the obligations of traders in general are included those of bankers, brokers, commission agents and other agents, also all sorts of partnerships and transactions on joint account, and all trading companies, sailing or steam-ship companies and mail companies, also joint proprietorship in vessels etc. Under the term Acts of Commerce we comprehend all acts done in connection with the purchase of goods for the purpose of reselling the same, either wholesale or by retail, either in their natural or in a manufactured state, or merely for the purpose of letting the same for hire.

Objects of the lex mercatoria.

The *lex mercatoria* likewise includes, under the denomination of Acts of Commerce, besides the acts of traders or merchants in general, the following transactions, viz.:—

The acts of brokers and administrators of public stocks and public companies; further, all commission business and banking operations and whatever relates to exchange transactions, without distinction as to the person concerned, and whatever relates to notes payable to order, with regard to traders only. Under the same denomination is comprehended whatever relates to contracts made for the building, repairing or fitting out of vessels and the purchase or sale of vessels for inland or foreign navigation; all forwarding and conveyance of merchandise; the purchase and sale of shipstores and provisions; all shipowning, freighting or chartering of vessels, as also bottomry and other agreements relative to shipping; the hiring of masters, mates and

mariners and their engagements in the mercantile marine; the acts of managers, shipbrokers, custom-house agents and book-keepers and other merchant clerks in the business of their employers; all insurances.

Objects of the *lex mercatoria* are also the obligations which originate from collision, drifting, fouling or running down of vessels; also from salvage, shipwreck, stranding, flotson, jettison and average.

Partnership and Corporations.

Partnerships and Corporations. There are three kinds of commercial partnerships, viz.:—

a. Partnership contracted by two or more persons for the purpose of trade under a social firm, called general partnership *(société en nom collectif)*.

b. Partnership contracted by one or more persons, responsible to the whole extent of their property, in combination with one or more persons who simply invest in the partnership a certain amount of money, called commandite partnership *(société en commandite)*. Such partnership is carried on under a social firm, which must include one or more of the responsible partners.

c. Trading companies or corporations which are not carried on under a social firm or under the names of any of the partners, but under the name of the undertaking *(Société Anonyme)* managed by agents (partners or non-partners).

The above mentioned distinctions are those followed by the European Continental Codes. "British Law," says Leone Levy, "recognizes only two kinds of partnerships, viz., *private partnership* with no more than seven partners,

and *public partnerships* or *corporations*, composed of any number of partners, with limited or unlimited liability."

"The English law does not provide for the formation of partnerships consisting of partners, some with a limited and some with an unlimited liability, on the principle of the commandite partnerships of France and other States. The English law allows limited liability to companies of seven members and upwards, but all the members have an equal liability, whether limited or unlimited. Yet it is submitted, that the combination of limited and unlimited liability is founded upon sound principles. It is just and reasonable that those who appear before the world as partners, who manage the affairs of the concern, and who, by their names or by their acts, either as directors or managers, whether of a private partnership or a public company, lead others to trust the firm, should be liable, to the full extent of their property, for any debts which that partnership or company may have contracted. But it seems also just and reasonable that a partner or shareholder who takes no part in the management and whose name never appears, and who is not likely to deceive third parties in the belief that he is a partner in the concern, should be liable only for the amount he had invested in the concern. This union of limited and unlimited partners is the distinctive principle of commandite partnership *(société en commandite)*, as contrasted with general partnership and with companies with limited or unlimited liability of the English law." *

Public Companies and Corporations. With regard to the laws of the United States of *American*

* LEONE LEVI. International Commercial Law. Vol. I. Chapt. III. IV & V.

America, Timothy Walker makes the following remarks. "The stockholders of a corporation *(société anonyme)*, unless the contrary is provided in the charter, are not personally liable for the debts or undertakings of the corporation beyond the amount of their shares in the capital stock; but the reverse prevails with respect to partnership. By the Common Law there is no such limited responsibility, and each partner is personally liable for all the partnership debts and undertakings. To limit this liability a special statute is necessary. In some of the States, such provision has been made and limited partnerships *(société en commandite)* are permitted, whereby a partner may put into the concern a given amount of capital and by making public record of the fact, may exempt himself from liability beyond that amount. Such provisions are deemed highly beneficial, because they take away the fear which often withholds capitalists from employing their means in this way."

With respect to Private International Law the above quoted author makes the following remarks. "The general rule is that the existence of foreign corporations is recognized for all purposes and in all respects except those specially prohibited by the domestic laws. Subject to this exception, they can make contracts, sue and be sued, establish agencies and do any other acts to which they would be competent in the place of their domicile. They must dwell in the place of their creation and cannot migrate elsewhere; but this does not hinder their rights from being recognized and protected elsewhere." *

Professor von Bar's opinion.

This is also the opinion of Professor von Bar, as will be seen from the following quotation.

* TIMOTHY WALKER LL. D. Introduction to American Law. Edit. Bryant Walker. 1874. page 240 & 754. Dr. C. L. von BAR. Das Internationale Private und Strafrecht.

"The natural persons belonging to a State are recognized as persons in every other State. This undoubted rule is a consequence of the equality of natives and foreigners, admitted by modern International Law. But by custom it is just as fully recognised that legal persons belonging to another State must also be so regarded. As regards burghs, parishes and churches, this is obvious, but it is just as true of other legal persons. For, although the authority of the foreign State, by which legal personalities are either directly created or their creation by private persons tolerated, has no weight in one State for itself, yet modern international intercourse requires the same recognition to be extended even to the legal personalities which may be capriciously created." *

"For instance, without such recognition companies constituted by shares could have no international dealings. It is no doubt conceivable, that we might escape from the difficulty by requiring all such institutions to obtain special State recognition from the proper authority in every State in which they might happen to deal or sue. But it might often be that the different States would impose contradictory conditions. The legal personality would, besides, have to be recognised by the Governments of almost all civilized States, so that the extended enterprises of trade might go on smoothly. That would lead to inexpressible difficulties and uncertainties. The only exception we recognise is when the foreign association pursues some object which is forbidden by our laws." †

* Judgment of the Supreme Court at Berlin, 8th Oct. 1849 (*Dec.*, 20, *p.* 326). "The recognition of legal persons requires, of course, that the laws that prevail at the seat of the same as to the constitution and minor arrangements of the company, shall rule."

† GUNTHER, page 279. FŒLIX, page 65. WACHTER, II, page 181–2.

"Conversely, an association which has no validity in its own country, cannot claim the rights of legal personality in another State. Legal personality, so far as private law is concerned, has no other end than to make it permanently possible to divide, according to certain conditions previously laid down, certain estates among actual individual persons, or to ensure the enjoyment and advantages of a particular thing or undertaking to an indefinite number of individuals."

"As regards the legal persons of the first kind, the division of the estate in the eye of the law takes place at the seat of the company; but if the law of that place does not recognise operations such as the company proposes to carry on, then the object of the association cannot in the eye of the law be attained at all. But with respect to the second class, it is just as plain, that, if the State in which it is proposed to establish the undertaking will not permit it to be established, the object of the association, as a matter of fact, can never be attained. A foreign State which should recognise as a legal person what was not so recognised in its own State, would be treating as valid legal facts directed to ends, that are either legally or actually impossible, a result at variance with general logical principles." *

"Rights which are generally conceded in our State to legal persons of the kind referred to, cannot be refused to legal persons of foreign States which have been recognised by us, since

* "It is easy to prove that the position of a company in its international relations is dependent closely upon its native legislation and its actual treatment there. An association, which has no legal existence in its own country, does not exist for foreign States; circumstances abroad cannot put any other face on it than it really possesses at home." MOHL. Staatsrecht Völkerrecht und Politik. Vol. I. p. 621.

this is what the general principle of legal equality between foreigners and natives requires.* But on the other hand, foreign institutions and associations cannot make available in our State privileges which are only conceded to them in their own, and rights which native legal persons must specially acquire, *e. g.*, the privilege of holding real property cannot be conceded to a foreign person except by the special indulgence of our State. The opposite view would place our own subjects at a disadvantage with foreigners. It is also an obvious exception to the rule that foreign institutions and associations are to be treated by the law just as our own, if the rights in question are, by special provision or by implication from native laws, applicable exclusively to native juristic persons. The latter is the case, for example, with reference to the special privileges of the public purse.† One cannot imagine that our subjects should be placed at a disadvantage in questions with a foreign treasury. On the other hand, charitable institutions, unless they have some exclusive object confined to their own State (*e. g.*, an hospital admitting only subjects of its own nationality), can lay claim to all rights which we concede to charitable institutions in our own country." ‡

To this Mr. Gillespie, the translator of Prof. von Bar's work, added the following note. "It is an established rule of Private International Law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the Courts of other States."……

* WACHTER Vol. II. p. 182. "The practice of the Supreme Court of Württemberg allows to charitable institutions of foreign countries the privilege of the forty years' prescription."

† WACHTER, II, page 181.

‡ Prof. VON BAR. Das Internationale Privat-und Strafrecht. Part III. § 41.

"But as regards procedure and parties to actions, the law of the country in which the action is brought prevails." *

"The powers of the corporation, the limits of its legal capacity, *e. g.*, its capacity to hold land, must of course be determined by the law of the country where it proposes to exercise its powers or capacity; the law of its domicile will determine whether it has been validly incorporated, but it will not be allowed to trade at the expense and to the disadvantage of foreign corporations, because, in the country of its own domicile, legal persons are free from the restraints which the foreign law imposes upon them. The extent of the mutual recognition is expressed in the conventions concluded between England and France, 15th May 1862; England and Belgium, 8th December 1862; England and Italy, 26th November 1867; and England and Germany, 27th March 1874. The operative clauses in these conventions, which are valid in Ireland and Scotland as well as in England, are in nearly the same terms. The most recent runs thus. Joint-stock companies and other associations, commercial, industrial and financial, constituted and authorised in conformity with the laws in force in either of the two countries, may freely exercise in the dominions of the other all their rights, including that of appearing before tribunals, whether for the purpose of bringing an action or for defending themselves, in conformity however, with the laws and customs in force in the said countries.....Such companies or associations, authorised in either of the two countries, shall only be admitted to the exercise of their business or trade in the dominions of the other

* LINDLEY. On Partnership. App. page 1483. WESTLAKE. § 286.

country, if found to be in compliance with the conditions prescribed by the laws of that country."

"It has been thought that a company incorporated in one country cannot carry on business in another country, so as to acquire a right to sue on contracts entered into there; it is said that such a company is trading beyond the limits under which it is constituted, and that a company, belonging to a country where the conditions of incorporation are less rigid, may have advantages over others constituted in countries where the law requires certain formalities and conditions to be observed, so as to ensure fair trading, or, it may be, for fiscal purposes."

"The Canadian Courts have countenanced this view; but the English Courts, although they have never been called upon to decide the question, have assumed the contrary. The high authority of Mr. Justice Lindley (page 1484), is to this effect. It is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation, and are not illegal by English law."

"If the law were otherwise, every company desiring to trade in a foreign country would require to be incorporated anew, and it might be on a totally new footing. The recognition of the incorporation of a company which has been validly formed under the provisions of a foreign law is demanded by the first principles of International Law, which assume that in all civilised countries safeguards of the same kind, although differing infinitely in detail, will be adopted to ensure honest dealing and the administration of justice; and finally, the language of the conven-

tions, quoted above, seems at once to coincide with theories expressed in the text, and to show what the common experience of nations has found necessary and advantageous. If the doubts of the Canadian Courts were well founded, the recognition of foreign corporations and their rights would be so limited as to be illusory." *

"Following out the same principles, the German Courts have recognised and allowed to a foreign company, validly formed according to foreign law, a right of action against German subjects, although the principles of its constitution are forbidden in Germany, and companies so constituted are declared null (Holthausen & Co., v. Comptoir d'Escompte de Paris, App. Ger. Cöln. 28 April 1877). The grounds of this decision are precisely the same as those on which Mr. Justice Lindley defends his doctrine, as stated above."

"It may of course happen, that a company which has its principal office abroad, may have established it there with express purpose of engaging in some trade not permitted in the country to which it truly belongs, and of escaping some restrictions upon the constitution of companies which are imposed by the law of the country to which it truly belongs, *i. e.*, where its directors or managers reside, where its trade truly lies, and where its shares are held; such an illusory establishment will certainly not be recognised so as to oust the penal jurisdiction of the country to which the directors belong, or to dispense with the formalities required by its law *(Compagnie de Chemin de Fer du Nord et de Catalogne, C. de Paris,* 2nd July, 1877*)*. But a

* On these principles a Convention was concluded between the Netherlands and Italy, on the 11th April 1868 (*Staatsblad*, 1869, No. 71), with regard to mutual recognitions of *Sociétés Anonymes*.

mere agency or a subsidiary establishment in France, coupled with the fact that the shares are to a large extent held by Frenchmen, will not make a company amenable to French law, so that any neglect in its constitution of the requirements of French law, which in the case of a French company would involve its directors in criminal responsibility, can be charged against them in a French Court, if the meetings of shareholders have always been held abroad, the capital largely employed abroad, and the chief office situated abroad, the company having been originated and incorporated abroad, *(Chandora v. Banque Européenne, 10th February 1881, Trib. Comm. de la Seine).* Nor will the establishment of an agency in France give a company the same status as an individual acquires by residence, accompanied by Government licence to reside—viz., a title to bring actions against a foreigner in a French Court *(Rubattino v. Kundz & Werder, 25th February 1876, Trib. Comm. de Marseilles).* This latter decision is not in conflict with what has been above taken to be the law of England; a company is treated like an individual, and its right to sue is regulated according to its true nationality,—domicile does not, as with us, give a title to pursue an action in France against a foreigner upon a contract; it is a principle of French law that the right to sue, being a *droit civil*, does not belong to foreigners; hence a mere trading domicile does not give a right to sue in France, where the defender is also a foreigner, but a foreign company, just like a foreign individual, may sue a French debtor in France, while the constitution of a foreign company will be recognised just as the majority of an individual, and no French shareholder will appeal successfully to the Courts of his own

country to protect him against resolutions passed by the shareholders of a foreign company, to which he belongs, in conformity with the requirements of the law of the country to which the company belongs *(Buisson v. Ch. de Fer Seville Xeres, Cadiz. Trib. de Comm. de la Seine, 25th June 1875)*; just as no French creditor can appeal to the courts of his own country to give him redress against a resolution passed in the course of the liquidation of a foreign company abroad by the statutory majority of creditors *(Dubois de Lachet v. Cie de Chemin de Fer du Nord de l'Espagne, C. de Cass., Paris, 18th January 1876)*. But again, just as an individual, residing or trading in France, may be sued there by a French creditor, although he is not by birth or naturalisation a French subject, because it is, according to the French law, the first object of the legislator to protect his own citizens, so a foreign company which has an agent in France may be sued there, upon contracts made in France by their agent *(Duché et Fils v. Raymond et Cie., C. de Cass.; Paris, 18th August 1875)*."

"The Italian Courts have drawn a distinction, which, to a certain extent, accords with the distinctions noted above as existing in France, between the relations subsisting between the company and its shareholders on the one hand, and the relation between the company and third parties, on the other. The shareholders are, by a quasi contract, bound to submit their relations with the company to the law in force at its statutory seat; debtors or creditors are entitled to rely upon the law of their own country, if that be the real seat of that branch of the company's trade with which they have had to do *(Florence Land Company v. Guarducci; Appeal Court of Lucca, 9th April 1880)*."

"In England and Scotland, the possession of an agency by a foreign company will give jurisdiction to the English or Scotch Courts, in matters arising out of contracts made in the course of the business carried on by these agencies or connected with them *(Lindley, page 1485; Mackay, Practice of the Court of Session, Vol. I. p. 182)*." *

Merchant's Books. In order to participate in the privileges of the *lex mercatoria*, the trader is bound to keep proper books, of which the principal is the *journal*. In this must be entered, day by day, in order of date and without interpolation of blank spaces or marginal notes, his claims or assets and debts, his commercial transactions, drafts, acceptances, his engagements and generally all he receives and pays, without exception. The above is required independently of such other books as are customary in trade, though not explicitly required by the respective Municipal Law. The trader is also bound to preserve the letters he receives and to keep a copybook of those he despatches. He is bound, to draw up annually, in a separate register, to be kept for that purpose, a balance sheet and statement of the position of his affairs and to affix his signature thereto.

Merchant's Books.

The keeping of proper books is of the utmost importance to a trader, for by general principle of the *lex mercatoria*, whenever a transaction is not absolutely denied or when its existence is generally established, commercial books, regularly kept and confirmed by oath, or in case of demise of the trader, furnish proof between traders, with regard to their commercial dealings, as to the date or time of the transaction

Merchant's Books as evidences in Law Courts.

* Note by G. R. GILLESPIE on § 41 of Prof. von Bar's work, above cited. page 156.

and the delivery, the quality, quantity and price of the goods. Copy-books of letters, properly kept, are likewise admitted in evidence in commercial suits.

With regard to the judicial exhibition of mercantile books, the following rules are generally observed by Law Courts.

1°. No one can be compelled to exhibit his books, balance sheets or other papers relative thereto, except on behalf of persons immediately interested, either as heirs or as concerned in a mutual transaction, as partners or as the party appointing administrators or managers, and lastly in case of bankruptcy.

2°. In the course of a law-suit, the judge, at the request of one of the parties, or *ex officio*, may order the books to be exhibited, that he may cause the same to be inspected or extracts to be made therefrom, respecting the contested points.

3°. Should such books be kept at another place than that where the Court, before which the case is pending, holds its sittings, such Court is at liberty to rule that the party concerned shall procure, within a fixed limit of time, a judicial inspection and report of the points in litigation out of the respective books, through the proper legal authority at the place where those books etc., are kept.

4°. The party who either neglects to comply with this order of the judge and fails to prove the impossibility to get access to his commercial books and papers, and thus fails to exhibit his books, or refuses to do so, when his adversary is willing, on his side, to comply with the demand on his books and papers, prejudices his own cause, as the judge may accept the adversary's sworn testimony as conclusive evidence.

Which law decides what are acts of Commerce; the qualification of Traders, their legal capacity and competency, and the obligation to keep merchant's books.

The question whether a transaction is or is not to be classed as an act of commerce, subject to the rules of the *lex mercatoria*, with all its peculiar requirements and privileges, must be decided by the *lex loci contractus*. As to the question concerning the respective mode of procedure, emanating from the *lex mercatoria*, the legal remedies, especially with regard to the principle of sworn evidence based on the books of the merchant concerned, the decision depends upon the *lex fori*. The decision of the question whether certain professions qualify the titularies as members of the mercantile community *i. e.* as traders, and their legal capacity and competency, is governed by the *lex domicilii*, which decides also with regard to the local obligation of keeping proper mercantile books and their forms.

Legal interest.

The special rules of the *lex mercatoria*, with regard to legal interests in commercial transactions are decided by the *lex loci executionis*.

We remarked above (§ 38) that the enactments of commercial and shipping legislation cover the principal ground of international transactions. We will now proceed to note the rules which govern the conditions and relations of the principal of these objects of the *lex mercatoria*, in the following order, viz.:—

1°. Bills of exchange; 2°. Revendication in matter of commerce (stoppage *in transitu*). 3°. Insurance; 4°. Average; 5°. Abandonment; 6°. Shipping; 7°. Shipmasters, officers and cre 8°. Freighting and chartering; 9°. Passen 10°. Bottomry; 11°. Prescription of marin tracts; 12°. Collision; 13°. Salvage, ship stranding and flotson; 14°. Bankruptcy Surcease of payment granted to traders.

foregoing points will be discussed in paragraphs 59–84. *

X.—*Bills of Exchange.*

§ 59. A Bill of Exchange is a document, dated from a place at which the subscriber called the *drawer*, charges some person called the *drawee*, to pay, in the same or in another place, at or after sight, or at a stipulated time, to a designated person, called the *payee*, or to his order, a sum of money therein expressed, with acknowledgment of value received or value in account. A bill of exchange may also be drawn: *a.* to the order of the drawer, *b.* on a certain individual and payable at the residence of a third party, *c.* for account of a third party. A bill of exchange may be drawn singly, or in duplicate or in triplicate etc., but any one copy of a set avails for any other of the same set or for the whole set.

"The object of all traffic in bills," says Bar, "is that the creditor shall receive a certain sum of money at a certain time, and generally at a certain place. But since the creditor may find it more profitable to receive this sum, or more correctly speaking its equivalent, at some other place or some other time, he has the privilege given him of transferring his right in the bill absolutely to some other party and getting his equivalent out of the consideration paid him. To attain these objects, (which are not identical with those of a true paper currency, although they resemble them), the obligation in a bill consists of an accurately framed undertaking to pay a particular sum; and this undertaking, in contrast with the other legal relations which

* In stating the rules of the various Continental Commercial Codes we follow the official English translation of the Netherlands Code, edited by the department of Foreign Affairs at the Hague in 1880.

arise between the holder of a bill and the debtor, is visibly expressed in a written declaration of intention, and is governed by this expression of intention alone; but, at the same time, just because the obligation of the debtor is so exactly defined, there is laid upon the holder, in order to uphold the system, and to avoid loss, a series of obligations as to the diligence which is competent to him. And lastly to insure the object of prompt payment, there is given to the holder an exceptionally summary process against the debtor and, in many systems of law, a special kind of execution against his person."

"From these principles we may deduce, with the help of the general principles which regulate the law of contracts, what territorial law is to determine the particular obligations, rights and transactions that are to be found in the law of bills." *

A bill is, in the technical phrase, said to be *honoured* when it is duly accepted; when it becomes payable by lapse of time, it is said to have *arrived at maturity*, and when acceptance or payment thereof is refused, it is said to be *dishonoured*. By the nature of the bill-contract, the drawer holds himself liable for the re-imbursement or re-exchange of the bill in case of its non-acceptance by the drawee, provided the holder has instituted, in due time, a formal protest against this non-acceptance or dishonouring of the bill. The time granted for this protest of non-acceptance is regulated by the *lex mercatoria* of the place where the bill is due, viz., the *lex loci executionis*.

If the bill be drawn for account of a third party, he alone is liable to the acceptor in respect

* Dr. L. VON BAR. Das Internationale Privat und Strafrecht, Translation of G. R. Gillespie, (1883), page 339.

thereof. The drawer is held to have drawn for his own account, if it does not appear, by the tenor of the bill, or by the letter of advice, for whose account the draft was made. All who have signed, accepted or endorsed a bill of exchange, are individually answerable to the holder for the entire amount.

Bills of exchange containing fictitious names or false indications of domicile or place of drawing or payment, are only effective as a simple acknowledgement of debt, provided the other requisites for that purpose be not wanting. Those who have been aware of such fictitiousness, cannot adduce the same in evidence against third parties who were ignorant of the fact.

Legal aspects of the bill of exchange.

The *lex mercatoria* of each State regulates the different legal aspects of the bill of exchange, viz., the engagement between the drawer and taker or *payee* of the bill, the accepting of bills of exchange and the guarantee called *aval*, the endorsement of bills of exchange, the engagements between the drawer and the acceptor, between the holder and the acceptor, and between the holder and the endorsers, the falling due and payment of bills of exchange, the rights and obligations of the holder in case of non-acceptance or non-payment of a bill and the extinction of the debt in matter of exchange.

Re-exchange.

Re-exchange is the redrawing, by the holder of a bill of exchange, on the drawer, or on the endorsers, for the principal of a protested bill and the charges, at the rate of exchange of the time of this redrawing. Such redrawing does not,—in case of non-payment, prejudice the holder's right to sue other liable parties.

A bill of exchange being, in its simplest aspect, regarded as constituting an act of mandate between the drawer and the acceptor, whereby the

latter engages himself to pay a certain amount to the holder at its maturity, it is a generally accepted rule that, with respect to the drawer, the re-exchange is regulated by the rate of exchange of the place, where the bill ought to have been paid, on the place from which it is drawn. With regard to the endorsers, the re-exchange is regulated by the rate of exchange of the place, whither it has been remitted or negociated by them on the place where the re-imbursement is effected. Where no direct rate of exchange exists between the different places, the re-exchange is regulated by that of the two places nearest the same.

Conflict of Laws with regard to the contract of exchange.

The contract of a bill of exchange, engagements to pay on promissory notes to order, assignations and cheques, banker's or cashier's notes and other paper payable to bearer, are contracts which, like the contracts of Civil Law, must be considered, with regard to questions of Conflict of Laws, in the following aspects, viz., the law which governs the personal capacity to contract *(lex domicilii)*, the *lex loci contractus*, the *lex loci solutionis* and the *lex fori.* *

The German and the French systems.

Although the bill of exchange is universally acknowledged to be a matter of general international use and utility, there exists nevertheless, as regards most of the above mentioned aspects, much diversity of legislation in the positive laws of civilized States, both in Europe and in America. These are divided into two main groups, of which one follows the French Commercial Code of 1807 and the other follows, in matters of bills of exchange and commercial papers of this class, the German *lex mercatoria*,

* PHILLIMORE, Comment. on Intern. Law, Vol. IV. Ch. XLII.

the principles of which are laid down in the German Commercial Code of 1861. *

To the first named category belong Egypt, Belgium, St. Domingo, Greece, Haiti, the Netherlands and her Colonies, British Canada, Malta, Mauritius, Italy, Monaco, Roumania, Polish Russia, the French Cantons of Switzerland, Servia, Turkey, Spain and her Colonies, Portugal and her Colonies, Mexico, Brazil, Peru, and the Spanish speaking Republics of South America. The principles of the German Commercial Code are generally admitted, outside the Empire, with regard to bills of exchange (Law of 1848), by Austria, by Russia for Finland, by Sweden and the German Cantons of Switzerland. Great Britain and her Possessions, (with the exception of those named above), have special laws and usages with regard to bills of exchange; this is also the case with the United States of America. Russia has her own special Code of Commerce. Special laws regarding bills of exchange exist also in Denmark, in some Swiss Cantons, in Norwegia and Hungary. The old ordinance of Bilbao is yet observed in the American Republics of Guatemala, Honduras and Paraguay. †

The different enactments of positive legislation in matters of bills of exchange are thus divided into two camps of nearly equal strength. The difference consists partly in a divergence of opinion concerning the character and nature of a bill of exchange, partly in certain rules prescribed

* On the German *lex mercatoria*, see: GOLDSCHMIDT Handbuch des Handelsrechts. Erlangen. 1864. The Conflict of Laws with regard to bills is dealt with at length by BRACKENHÖFFT, in his Archiv für Deutsches Wechselrecht, Vol II, pp. 129–162, 278–301. See also Hoffmann's Ausführl. Erläuterung der Allgemeinen Deutschen Wechselordnung, pp. 597–611.

† BORCHARDT. Vollständige Sammlung der geltenden Wechsel and Handelsgesetze aller Länder. Berlin 1871. Vorwort.

concerning minor particulars connected with this commercial transaction.

The lex loci contractus and the lex loci solutionis with regard to Bills of Exchange.

The rule *locus regit actum* is generally understood to govern the form of the bill of exchange at its first issue, but with regard to the application of this rule to the forms of the *endorsements* on the bill, there are two different systems in vogue. The application of the rule *locus regit actum* is in all instances governed by the principle of the *contrat de change* of the French Code, by which the formalities of every declaration made on a bill of exchange, viz., that of the drawer, of the endorsers, of the acceptor etc., must be in conformity with the respective laws of the different States in which the bill is negotiated. All endorsements, therefore, made subsequent to any one conflicting with the law of the respective place where it is placed on the bill, and which is consequently void by that law, are all to be regarded as void also, though being, intrinsically, in conformity with the law which governs them individually. The modern or German system, however, deviates from the foregoing rule, and considers a bill of exchange more in its absolute character of a mandate to pay under certain special conditions. At the outset, of course, this mandate must be in conformity with the law of the place whence it originally issues, but the obligation incurred by the acceptance or making of a bill is considered to be determined by the law of the place where it is payable *(lex loci solutionis)*. Under this system, accordingly, irregularities attaching to endorsements under their respective foreign laws, are not taken into consideration, provided the endorsement in question is in harmony with the forms of the *lex fori* or with the *lex loci solutionis*.

In the case of the French system, the rule *lex*

loci contractus has the preponderating influence, while in the case of the German system the *lex loci solutionis* is the principal guide.

With regard to the English laws under this head, it has been established as a general principle in the English Courts, that the liabilities of the drawer, the acceptor and endorser, must be governed by the laws of the countries in which the drawing, acceptance and endorsement respectively took place *(lex loci contractus)*. Under this system an acceptance or endorsement, void by the law of the country where it is made, is not binding where English Law prevails. *

With regard to the laws of the Unites States of America, under the head of *lex loci contractus*, Story observes that "by the general commercial law, in order to entitle the indorsee to recover against any antecedent indorser upon a negotiable note, it is only necessary that due demand should be made upon the maker of the note at its maturity, and due notice of the dishonour given to the endorser. But, by the laws of some of the American States, it is required, in order to charge an antecedent endorser, not only that due demand should be made and due notice given, but that a suit should be previously commenced against the maker, and prosecuted with effect in the country where he resides, and then, if payment cannot be obtained from him under the judgment, the endorsee may have recourse to the endorser." In such a case, it might be inferred, as a matter of principle, that the endorsement, as far as its legal effect and obligation and the duties of the holder are concerned, must be governed by the law of the place where the endorsement is made. †

* WESTLAKE. Private Intern. Law, p. 243 et seq. PHILLIMORE. Comm. on Intern. Law. Vol. IV. Chapt. XLII.

† Story. On bills. §§ 156 and 157.

The following opinion, in the matter of bills of exchange, delivered by Judge Lewis of the Supreme Court of Pennsylvania, 16th May 1854, in the case *Lenning v. Ralston*, and cited by Sir Robert Phillimore, in a note on Chapter XLII of Vol. IV of his Commentary on International Law, will give some insight into the American Law concerning this branch of the *lex mercatoria* and, at the same time, illustrate the different and occasionally complicated aspects of the transactions entailed in certain cases by bills of exchange. The opinion given by the Judge in the above mentioned case runs as follows. "This suit is brought for the benefit of the Commercial Bank of London, upon an instrument, which bears upon its face every mark of a foreign bill of exchange, drawn in Philadelphia, upon a house in London, and accepted by the latter. It is true that the bill was not actually negotiated in this State, so that it is not, within the letter of the Statute of 1821; a bill drawn in Pennsylvania. The drawers had a mercantile house in Philadelphia, and they placed 'Philadelphia' at the head of the bill as the place at which it was to bear date, leaving blanks for the day of the month, and the year. They fixed the amount of it and signed it, leaving blanks also for the period which the bill had to run before maturity, and for the names of the payee and acceptors. All this was done by the defendants here. The instrument was then sent, in this imperfect condition, to their partner in London. They authorised him to fill the blanks and negotiate it in London, and he did so. It was purchased by the Bank without any notice of the manner in which it originated, or of the fact that it was issued in that city and not in Philadelphia. When that institution became the holder, it bore

the dress of a bill of exchange drawn in Pennsylvania, and, upon the principle that every one is presumed to intend to produce all the consequences to which his acts naturally and necessarily lead, the presumption is that the defendants intended that the purchasers of it should receive it under the belief that it was a bill drawn in Philadelphia in the usual course of business. The question is *whether they shall be compelled to perform their contract in the sense in which they intended the opposite party to understand it, or in a sense contemplated only by themselves and entirely excluded by the terms of the instrument itself.* It is very material to the parties that this question should be properly decided. The bill was drawn on July 3, 1850. The Act of May 13, 1850, reducing the damages on dishonoured foreign bills of exchange to 10 per cent., contains a provision limiting its operation to bills drawn after the 1st of August 1850. So that, if the bill in question is to be enforced according to its terms, the Act of 30th March 1821, giving 20 per cent. damages for its dishonour, furnishes the rule of decision."

"All writers of authority on questions of morals agree, that promises are binding in the sense in which the promissors intended at the time that the promisees should receive them (*Paley.* Chap. V.; *Wailand.* Chap. II.; *Adams.* Part III. Chap. V). Upon this principle, it was deemed a gross violation of contract, when Mahomet, after promising to 'spare a man's head,' ordered his body to be cut through the middle. When Tamerlane, at the capitulation of Sabasta, promised to 'spill no blood,' it was an infraction of the treaty to 'bury the inhabitants alive.' These monstrous constructions of contracts were condemned by the civilized world as gross violations of the es-

tablished rule of construction already indicated (*Vattel.* Lib. II. Chap. XVII. § 274). There can be no plainer principle of equity, than that which requires every one to speak the truth, if he chooses to speak at all, in matters which affect the interests of others. He that knowingly misrepresents a fact for the purpose of inducing another to part with his money or goods, is held to his representation in favour of the party who confided in it. It is upon this principle, that the maker of a negotiable instrument is not allowed to impair its value in the hands of a *bonâ fide* holder, by denying the existence of a consideration, or by otherwise showing that it is not what it purports to be (*Chitty.* On Bills. 9; 7 C. & P. 633. *Byles.* On Bills. 65)."

"On the same principle, a man who procures credit for an insolvent person, by knowingly misrepresenting him a man of ability, is bound to answer in damages for the injury thereby produced. In truth, the merchant law is a system founded on the rules of equity, and governed in all its parts by plain justice and good faith." (*Master v. Miller*, 4 T. R. 342).

"When this bill was dressed in the costume of a Pennsylvania bill, it thereby gained a credit in the foreign market which it would not otherwise have received. The Act of 1821, providing ample damages in case of the dishonour of bills drawn in Pennsylvania, contributed to give it that credit. That Act must be considered as operating on the minds of those who purchased it. In *Ripka v. Gaddis* (Philad., March 1851), it was declared by this Court, after a careful examination of the authorities, that '*it had been long established in the case of negotiable paper of every kind, that it is construed and governed, as to the obligation of the drawer or maker, by the law of the country where it*

was drawn or made; as to that of the acceptor, by the law of the country where he accepts; and as to that of the endorser, by the law of the country where he endorsed.' In *Hazelhurst v. Kean* (4. Dal. 20), it was affirmed that '*the parties in the purchase of a bill of exchange must be supposed to have in contemplation the law of the place where the contract was made, and it—that is the law of the place where the bill was drawn* *—*necessarily forms part of the contract.*' In *Allen v. the Bank* (5 Whar. 425), the same principle was re-asserted. From this rule, thus repeatedly recognised and well established, it follows: that the Bank, in the purchase of this bill, must be supposed to have had in contemplation the law of Pennsylvania, providing indemnity for its dishonour. The law of this State was therefore a part of the contract of purchase, and we have no right to impair its obligation."

"There is no reason why the Statute of 1821 should not receive a liberal construction. It has been held that it is not penal, but, on the contrary, it is a remedial Act; that the damages given are not for punishment, but are intended as compensation; that its provisions are just and equitable, and highly necessary in a commercial community, to guard the interests of innocent individuals, and to secure good faith in commercial transactions (5 *Wharton*, 425). No one can foresee the extent of the injury which the holder of a foreign bill of exchange may suffer from its dishonour. It is not like a domestic obligation, the breach of which can, in general, be repaired by the presence and credit of the holder. But the dishonour of foreign bills may occur, and usually does occur, at points where the holders cannot supervise the result, and where they have neither means nor credit to

* The *lex loci contractus*.

provide against the injury. These instruments are generally procured at a premium by the holders, for the purpose of making their purchases in the country where they are payable, or as the means of pursuing their travels, or maintaining their credit abroad. The great distance between the residence of the drawers and that of the acceptors, must necessarily cause great delay in procuring indemnity from the former. In the meantime the loss to the holders, if they rely exclusively upon the bills to maintain their credit, and carry on their business, might be irreparable. Under such circumstances the recovery of the face of the bill only, with the usual interest, re-exchange, and costs, would be but a cold and inadequate remedy for so great an injury. The Act of 1821 was deemed necessary, in order to do justice in such cases, and for the purpose of maintaining our commercial credit in other countries. It should receive such a construction as will best promote the intentions of the legislature in these respects. Upon the whole, we are of opinion, that the bill should be met by the drawers in the same sense in which they manifestly intended that it should be received by the holder, and we think that the District Court was in error in adopting a different rule."

"Judgment reversed, and judgment for the plaintiff in error for 1,453 dols. 31 c., with interest from the 18th May 1852, and costs of suit." *

Protest of Bills. Moratorium with regard to Bills of Exchange.

In the particular circumstances of war or general calamity, in which, for the temporary protection of traders, it is deemed necessary by the Municipal Legislature of the country thus situated, to extend the usual time within which dishonoured bills must be protested,—what is in

* LENNIG v. RALSTON. 23 Penn. State Dep. p. 137. Daily News of Wednesday, June 7, 1854.

legal phraseology called *moratoria*,—the foreign drawer and endorsers ought to be subjected to this law of necessity, and indeed on the general principle, that the obligation of the acceptor is governed by the law of the place of acceptance and of the place where the payment is to be effected *(lex loci solutionis)*, which also rules all questions arising with regard to the maturity of the bill, the manner of payment, etc.

The *moratorium*, however, created by the French Law of 13*th August* 1870, during the Franco-German war of 1870–1871, with a view to give temporary facilities to acceptors, to comply with their obligations, through extending the limit of the time of protest to a month after the maturity of bills of exchange, was not generally acknowledged by the German Courts. The German *Reichs-Oberhandelsgericht* at Leipzig, by judgment of 21*st February* 1871, decided against plaintiffs, in the action for re-exchange against a German drawer, on the plea that the protest for non-acceptance of the bill (payable in France) was not timely executed in France, but a month after the bill had arrived at maturity, although this was in conformity with the then existing *moratorium* of the French law. *

Rules with regard to Protest of Bills and re-exchange. Opinion of Professor von Bar.

With regard to *Protest of bills and re-exchange* Prof. von Bar gives the following rules. "The conditions of recourse are to be ruled by the law which determines the liability of that obligant in

* For the arguments *pro* and *contra* this principle, see Professor FICK. "Ueber internationales Wechselrecht in Beziehung auf Fristbestimmungen, insbesondere die französische Wechsel-Moratoriums Gesetze und Decrete," published first in the Central-organ für deutsches Handelsrecht, VII. p. 167, and also separately at Elberfeld, 1872. The consultation held at Berne, 12 March 1871, by Prof. MUNZINGER and NIGGELER. "Rechtsgutachten betreffend die durch die prorogirenden Gesetze und Dekrete der französischen Behörden hervorgerufenen Regressfragen," § 93. CHARLES BROCHER. Etude sur la lettre de change etc. Revue de Droit Intern. 1874 p. 210.

the bill against whom recourse is desired to be had, and, therefore, as a general rule, by the law of the place from which the indorsation, or the bill itself, as the case may be, is dated; the rule, that the holder is entitled to rely upon the *litera scripta* being applicable in this case also. For the obligant has bound himself ultimately to pay the contents of the bill, if the conditions required by his own law are fulfilled: we refer especially to the requirement of a protest or notification. Many authors are, however, of a different opinion. The opinion which makes the law of the place of the action the rule, unless it proceeds on the principle that the *lex fori* is always applicable, if that law does not itself command the application of some other, does not require further discussion, and we need only note, that, as the place of action and the domicile of the obligant will, as a general rule, be the same, the result of that theory will generally coincide with the result of our own. But if it is to be contended against us from another point of view, that, in this matter, all the parties to the bill have subjected themselves to the law of the place of payment, and that it is imperatively necessary, in judging of a right of recourse which affects several parties, that one and the same law should rule all the various claims of recourse, because any obligant who pays must have it in his power to recover from the obligant who is prior to him;—we must take exception to the former of these arguments by pleading that the importance of the solemnities required to found a right of recourse lies in reality in this, that the person against whom recourse is to be had, need only pay, if he is provided with summary evidence and immediate intimation of the fact that the contents of the bill have been demanded in vain

from the principal debtor and that therefore the solemnities in discussion here are of no importance with reference to the obligation against the drawee (or, as it may be in some bills, the maker), and can consequently have no connection with the law of his domicile."

"The weight of the second argument is lessened by the consideration, that the form, the place,* and the time appropriate for taking a protest are ruled by the law of the land where this protest is to be taken (and so, as a general rule, by the law of the place of payment)."

"It follows from the fact that a protest upon a bill is a public instrument, and that this instrument obtains faith with the public by being executed by some official or notary under the rules of his own law exclusively, as the rule '*locus regit actum*' requires, that the form of the protest must be determined by the law of the place where it is taken. As the protest shows that payment has been demanded at the proper place from the principal obligant,—that is, the acceptor, or in certain circumstances the maker, of a bill,—it follows that the law of the place where the protest must be made, determines the particular locality where it is to be made. But that law, by which parties intended that payment should be regulated, is the only law that can determine whether application for payment was made to the principal debtor *opportuno loco*. Lastly, the period within which a protest must be taken is dependent upon the law recognised at the place where it is taken, because the principal debtor undertakes his obligation, and the other obligants intend that he shall undertake the obligation only in conformity with his own

* By "place" is meant here the particular locality, i. e. the dwellinghouse or place of business of the debtor.

law, and the protest is meant to supply evidence that he has not fulfilled his obligation or has failed to undertake it." *

XI.—*Stoppage in transitu.*

Stoppage in transitu.

§ 60. If goods or merchandise have been sold and delivered and not been fully paid for, the vendor is entitled, on failure of the vendee to reclaim the same under certain regulations as stipulated in the respective *lex mercatoria*. This revendication in matter of commerce is termed *stoppage in transitu*. Regulations concerning revendication are generally based on the following principles.

1°. For the exercising of the right of revendication, it is requisite that the goods or merchandise, unmixed with others, be identically the same which have been sold and delivered; this is termed "*in naturâ*."

Proofs of the identity are often admitted even if the goods should be unpacked, repacked or diminished.

2°. Merchandise, sold, either on a fixed term or not, can be reclaimed while it is still on its way, whether by land or water, or when it exists "*in naturâ*" in the hands of the insolvent vendee or in the custody of a third party who keeps the merchandise for him.

In both cases the reclaim can only be effected within a certain space of time, as stipulated by the respective *lex mercatoria*, from the day on which the merchandise has been stored under the insolvent vendee, or the third party.

3°. If part of the price of the goods has been paid by the vendee, the vendor, on reclaiming the whole of them, is obliged to return to the

* VON BAR. Das Intern. Private und Strafrecht. Translation of G. R. Gillespie, page 346 et seq.

estate the money he has already received on account.

4°. Where only a part of the merchandise sold is found in the estate, the money to be returned by the vendor shall be according to the proportion which the amount of goods recovered bears to the total amount sold.

5°. The vendor who recovers his merchandise, is obliged to indemnify the insolvent estate of the vendee for all that has already been paid or is due, for freight, commission, insurance, general average, and whatever else may have been expended for the preservation of the merchandise.

6°. Where the vendee has acccepted a bill of exchange or other commercial paper, for the full amount of the merchandise sold and delivered, no reclaim takes place.

Where accepted bills cover only part of the amount due, the reclaim can take place, provided security be given to the insolvent buyer's estate, for what may be claimed from it on account of such acceptance.

7°. If the merchandise has been *bonâ fide* taken by a third party as security for a loan, the vendor still has the right to reclaim it, but is bound to repay to the lender the amount lent thereon, together with the interest and charges due.

8°. The reclaim of the goods becomes void, when they have been *bonâ fide* bought by a third party, on invoice and on bills of lading or carriage-notes, during the voyage.

The original vendor is nevertheless entitled, in that case, to recover the purchase-money from the buyer to the amount due to him, as long as this has not been paid; and he is privileged for that amount, which may not be included in the insolvent's estate.

This may also be applicable in case the goods, —after having been in the possession of the insolvent debtor or of some one on his behalf,— have, by regular purchase and delivery, become the *bonâ fide* property of another party.

9°. The managers of an insolvent estate are at liberty to retain the reclaimed merchandise for the estate, provided they pay to the vendor the price, which he had agreed on with the insolvent vendee.

10°. As long as goods or merchandise, consigned on commission, remain *in naturâ* in the custody of the insolvent agent, or of a third party who possesses or keeps the same for him, they can be reclaimed by the consignor under the liability noted in sub-section 5°.

The same right of reclaim holds good as to the purchase-money of goods, consigned on commission, where these have been sold and delivered by the agent. The consignor may reclaim as much of the purchase-money as has not been paid before the failure of the agent, even if the agent should have charged for his guarantee of the buyer, or under the usual denomination of "*del credere*."

11°. In case the consigned goods have been, *bonâ fide*, taken by a third party, as security for a loan, sub-section 7°. is applicable.

12°. If in an insolvent estate there be found bills of exchange not yet due, or due and not yet paid, or commercial or other papers, placed in the hands of the insolvent, either with orders only to procure payment thereof and hold the amount at the disposal of the sender, to effect payments specially indicated therewith, or designedly intended to cover bills of exchange drawn on and accepted by the insolvent or notes made

payable at his domicile; then all such bills of exchange, commercial or other papers, can be reclaimed as long as they exist, *in naturâ*, in the hands of the insolvent or of a third person who holds or keeps them for him. All this is, however, without prejudice to the right of the estate, to require security in return for what can be claimed from it, in consequence of the insolvent's acceptances.

13°. In the absence also of the appropriation or acceptance, mentioned in sub-section 12°., bills of exchange, commercial or other papers, remitted to the insolvent, can equally be reclaimed, even if the same should be brought in account-current, provided the sender has not, at the time of remitting or since, been indebted to the insolvent for any sum whatever, the charges on the remittances excepted.

14°. In cases other than failure, any merchandise sold without term of payment, and unpaid, can be reclaimed in accordance with rules laid down in the respective Civil Law, with regard to rescinding of contracts of sale.

The faculty of reclaiming such merchandise is defeated when the same, after having been in possession of the original buyer or of some one on his behalf, has been, *bonâ fide*, sold and delivered to a third party.

If, however, the purchase-money has not been paid by such third party, the original vendor can claim the amount of his bill or invoice out of the same, provided this be done by him within the term fixed by the respective *lex mercatoria* (usually 30 days) after the original delivery.

Sir Robert Phillimore's statements on stoppage in transitu.

With regard to the right of stoppage in transitu, Sir Robert Phillimore makes the following statements.

"According to the Roman Law, a contract of sale worked a *jus ad rem*, but did not, by the mere effect of consent, as in England, work a *jus in re*, a transference of the property *(dominium)* in the thing sold: '*qui rem nondum emptori tradidit adhuc ipse dominus est.*' * And again, '*traditionibus et non nudis pactis dominia rerum transferuntur.*' It was a necessary result of this maxim, that either party might withold performance of his obligation on the other becoming unable to perform his part."

"The Law of Continental Europe adopted, pretty generally, the rule that a seller was entitled, in all cases, and even after actual delivery, to have restitution of his goods, if unchanged in form, and capable of being distinguished from the stock of the buyer. The Scotch Law allowed restitution to the seller, on the ground of presumptive fraud, within three days of the bankruptcy of the buyer. This right of the seller, according to Continental Law, was called the right of revendication."

"A right closely analagous to that of revendication was introduced, by the reason of the thing and the exigencies of commerce, into the English Law at the end of the seventeenth century, and into Scotland at the end of the eighteenth century, it was called, and is now universally known as the right of *stoppage in transitu*. It has been adopted by France in her Code de Commerce, in the place of the old *revendication*."

"The Law" (Lord Wensleydale observed, in a leading case on this subject) "is clearly settled, "that the unpaid vendor has a right to retake the "goods before they have arrived at the destina- "tion, originally contemplated by the purchaser,

* Instit. III. T. XIV. 3.

"unless in the meantime they have come to the "actual or constructive possession of the vendee. "If the vendee take them out of the possession of the carrier into his own before their "arrival, with or without the consent of the "carrier, there seems to be no doubt that the "transit would be at an end; though, in the case "of the absence of the carrier's consent, it may be "a wrong to him, for which he would have a "right of action. This is a case of actual possession, which certainly did not occur in the "present instance. A case of constructive possession is, where the carrier enters expressly, or "by implication, into a new agreement, distinct "from the original contract for carriage, to hold "the goods for the consignee as his agent, not "for the purpose of expediting them to the place "of original destination, pursuant to that contract, "but in a new character, for the purpose of "custody on his account, and subject to some "new or further order to be given to him."

"The right of stoppage *in transitu* is, Lord Stowell observed, 'not only the doctrine of the Law of England but the general expression of the Mercantile Law on the subject.' The consignor has what Lord Mansfield called 'a proprietary lien' upon goods *in transitu* for which payment has not been received. This doctrine was transplanted from the *lex mercatoria* into the Common Law of England. Great doubt and dispute have prevailed, and, perhaps, still do prevail, as to whether this right of stoppage amounts to a *rescinding of the contract*, or to a mere extention of the doctrine of the seller's lien upon the thing sold."

English Decisions. "It may be well to state that the English decisions appear to have established the following propositions as incident to this right."

"1°. The right of stoppage *in transitu* can only be exercised by a seller or person standing in the position of a seller of goods," (that is a *trader*, § 58).

"2°. The right is limited to cases in which the bankruptcy or insolvency of the vendee has taken place. A partial payment by the vendee does not prevent the exercise of this right."

"3°. As a general rule the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee; during this period, as well as while they are in the vendor's possession, the vendor's right of stoppage remains."

"4°. Notice on the part of the vendor, by himself or agent, to the carrier not to deliver the goods, suffices to cause the right of stoppage to attach."

"5°. The better opinion seems to be that the effect of the exercise of the right is merely to replace the seller in the same position as if he had not parted with the possession of the goods, and not to *rescind* the contract; but the point cannot be said to have been decided."

"6°. The right of stoppage is defeated when a bill of lading has been indorsed to a *bonâ fide* purchaser, without notice, for valuable consideration, and with the authority of the original seller."

What Law governs the right of stoppage in transitu.

"What Law is to decide as to whether this right of stoppage exists or not? The *lex loci contractus*, Mr. Burge says,* relying on Casaregis † and on English and North American United States decisions. It is a lien, Story says, which has rightfully attached *in rem*, and ought not to

* 3 *Burge*, 770.

† *Disc.* 179 N. 53-55.

be locally displaced by the mere change of the local situation of the property. The reason of things seems to be in favour of these opinions.

German decision. In a recent case, determined by the tribunal of the German Empire, merchandise sent from Bohemia to London fell into the hands of an agent for transmission *(ex éditeur de Hamburg)* at Hamburg at the moment when the consignee *(le destinataire de Londres)* became bankrupt. The consigner therefore claimed *(une demande en revendication)* a right of stoppage *in transitu* against the transmission-agent at Hamburg. The latter maintained that he had a right of detention as a set-off against debts due to him from the London consignee. The tribunal, taking the laws of Hamburg as its basis, decides against the Hamburg claimant." *

Stoppage in transitu by the buyer. The right of stoppage *in transitu* is in the seller, not in the buyer. The buyer may countermand the order, if in time, and with the consent of the seller he may rescind the sale; but if in insolvent circumstances, he cannot stop the goods *in transitu* without committing an act of improper preference to the vendor to the prejudice of other creditors (§ 79). †

XII.—*Of Insurance.*

General Principles. § 61. Insurance is an agreement whereby the insurer bind shimself to the assured, in consideration of a *premium*, to indemnify him for loss, damage, or the missing of an expected profit, which he may have to sustain in consequence of an uncertain event.

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* *Cette décision fortement motivée, est d une importance toute particulière en raison du caractère international* du Right of Stoppage. *Journal du Droit Intern. Privé.* V. III. N. 131. SIR ROBERT PHILLIMORE. Comm. on Int. Law. Vol. IV. Priv. Int. Law p. 643 et seq.

† LEONE LEVI. International Commercial Law. Vol I. Chapt. X. Sect. 6.

Subjects of insurance may, amongst other things be the following contingencies, viz., danger of fire; damages to which growing crops are exposed; the life of one or more persons; dangers of the sea (in which case insurance is called marine insurance); dangers of conveyance by land, or by rivers and inland waters. *Subjects of Insurance.*

Marine insurance is specially treated in the next section.

The rules of the *lex mercatoria*, generally adopted with regard to insurances, are as follow. *General Rules.*

1°. The insurer is in no case liable for damage or loss directly occasioned by any defect or deterioration peculiar to the species or nature of the thing insured, unless the risk thereof be explicitly included in the insurance.

2°. The insurer is not bound to indemnify, if he, who had insurance made on his own behalf, or for whose account insurance has been effected by another, has no interest in the subject-matter insured at the time of insuring.

3°. The insurance is made null and void by every wrong or untrue statement, or by reticence regarding circumstances known to the assured, even when *bonâ fide* committed on his part, provided such misstatement or reticence be of such a nature that the agreement would not have taken place, or would not have been entered into on the same conditions, if the insurer had been acquainted with the real state of things.

4°. As a general rule, no second insurance may be made for the same time and the same risk on things already insured to their full value, on pain of nullity of such second insurance (see rule 20).

5°. Insurance effected beyond the amount of the value or real interest, is valid only to that amount. Where the full value has not been insured, the insurer is, in case of damage, liable only in proportion of the part insured to the part uncovered. It may, however, be explicity stipulated between the parties, that, notwithstanding the greater value of the subject, damage to the same shall be made good to the full amount of the sum insured.

6°. The insurance becomes null and void if, at the time of effecting the insurance or during the time covered by it, any deviation occurs from what the respective law requires to constitute the agreement, or if stipulations are included in the agreement requiring anything to be done which is expressly forbidden by law.

Contract of Insurance. The Policy.

7°. Insurances must be contracted by an instrument in writing which is called a *policy*. All policies, (with the exception of those of life-insurance, which are subject to particular rules), must state the following particulars:—

a. The day on which the insurance has been made.

b. The name of him who makes the insurance for his own account or for that of a third party.

c. A sufficiently clear description of the subject matter insured.

d. The amount of the sum insured.

e. The dangers and perils which the insurer undertakes on his account.

f. The time at which the risk begins to run on account of the insurer, and when it ends.

g. The premium of insurance.

h. Generally all circumstances, the knowledge of which can be of real interest to the insurer; and all other conditions agreed upon between the parties and the insured. The policy must be signed by the insurer.

Begining duration and end of the risk.

8°. The contract of insurance exists as soon as it has been closed, and the respective rights and obligations of the insurer and the assured are from that moment established, even before the policy has been signed. The closing of the contract obliges the insurer to sign the policy within the appointed time, and to deliver it to the assured.

9°. Written evidence is required to prove the closing of the contract; all other evidence shall, however, be admitted, if in the first instance any written evidence exists. The special clauses and conditions of the contract can, nevertheless, be proved by any kind of evidence admissible in matters of commerce, if any difference arises about the same between the time of closing the contract and delivering the policy; provided, however, that written evidence be adduced of those particulars, the explicit mention of which in the policy is required by law, on pain of nullity, for some kinds of insurances.

10°. If the policy does not mention that the insurance has been made for account of a third party, the assured is held to have effected it on his own.

11°. The subject-matter of an insurance may be any interest appreciable in money, liable to danger, and not excluded by the *lex loci contractus* (§ 62, No. 8.)

12°. Insurance effected on any interest whatever, to which any damage included in the risk

had already accrued at the moment at which the contract was closed, becomes null and void, if the assured, or he who, with or without charge, procured insurance, was aware of the damage existing. Presumption that the damage was known, exists where it appears that, all circumstances considered, sufficient time had elapsed, since the occurrence of the damage, for the insured to be acquainted therewith. In case of doubt, the proof on oath is admitted, if this is in conformity with the rules of the *lex fori* (§ 62, 6°.)

13°. The insurer can always have the risk, which he has undertaken, reassured.

14°. When the assured has, by a formal act, liberated the insurer from his subsequent obligations, he may have his interest insured anew for the same period and the same risk. In such a case mention must be made in the new policy, on pain of nullity, of the previous insurance, and renunciation.

15°. When the value of the subjects insured has not been stated by the parties in the policy, it may be established by any kind of proof. If the value is stated in the policy, the Judge is qualified, nevertheless, to enjoin the assured to justify the expressed valuation more particularly where reasons, alleged by the insurer, afford good grounds to presume it to be over-rated. The insurer is at liberty, in all instances, to prove judicially that the valuation is overrated. When the subject insured, however, has been previously valued and such valuation has been duly sworn to by competent persons, named by the parties, the insurer cannot raise objections thereto except in case of fraud. This rule applies generally apart from the special exceptions made by the respective laws.

16°. No damages or loss, caused by an assured person's own fault, can be charged against the insurer. He may even retain or claim the premium, if he has already begun to run any risk.

17°. Where several insurances have, *bonâ fide*, been made on the same subject, and its full value has been covered by the first of them, this first alone is valid, and the subsequent insurers are released. If the whole value has not been covered by the first insurance, the subsequent insurers are accountable for the part deficient, in order of the time at which the later insurances have been closed.

18°. When more than the value has been insured on the same policy, by different underwriters, even at different dates, they are only chargeable collectively, for the exact value insured, in proportion to the sum for which each of them respectively subscribed. The same rule applies where several insurances have been made on the same subject on the same day.

19°. In the cases mentioned in the two preceding rules, the assured may not annul previous insurances with a view to bind subsequent insurers. If he releases previous insurers, he is held to have assumed their places respectively, as insurer for the same sum, and in the same rank. If he re-assures, the re-assurers take his place in the same order.

20°. It is not deemed an unlawful contract when, after having insured a thing for its full value, the person interested insures it a second time afterwards, with the special clause that he shall only have a right of claim on the new insurers, if, and for as much as he shall not be able to recover the loss from the first. In case of such contract, those previously closed must, on pain of nullity (see rule 4°.), be duly detailed

and the stipulations of the 17th and 18th rules will be applicable thereto.

21°. Whenever the contract of insurance is wholly or partially superseded or becomes void, and provided the assured has dealt faithfully, the insurer must return the premium, either wholly or the equivalent of that part for which he did not incur any risk.

22°. Where the nullity of the contract is caused by craft, deceit, or villany of the assured, the insurer receives the premium, without prejudice to any judicial action for which grounds may appear.

23°. Under reservations made by special clauses enacted with respect to some particular kinds of insurances, the assured is bound to use every endeavour and diligence to prevent or lessen the damage or loss, and to give immediate notice thereof to the insurer on its occurring; all this on pain of costs, damages, and interest, when grounds for such appear.

24°. The disbursements made by the assured to prevent or lessen the loss, will be charged on to the insurer, even when, added to the loss, they exceed the amount insured, or the endeavours prove fruitless.

25°. The insurer who has paid the indemnity for damage on the thing insured, acquires thereby all such right as the assured may have against third parties on account of that damage, and the assured is answerable for every act which may prejudice the rights of the insurer against them.

26°. If during the continuance of an insurance the insurer is declared to be in a state of bankruptcy, the assured is qualified to require either the annulling of the contract, or sufficient security that all the obligations of the insurer shall be completely fulfilled by the estate.

27°. Reciprocal or mutual insurance companies are bound by their covenants and statutes, and, in case of incompleteness of these, by the principles of the respective Municipal Laws.

§ 62. The general principles of *Marine Insurance* may be stated in the following terms. *Marine Insurance.*

1°. Besides the requisites mentioned in the preceding section, under sub-section 7, the policy of insurance against perils of the sea must state the following particulars :—

a. The name of the master and that of the ship, with designation of her kind, and in case of insurance on the ship, whether she is built of pine, teak or iron, or the declaration that the insured is not acquainted with these details.

b. The place where the goods have been or are to be shipped.

c. The port from which the ship departed or is to depart.

d. The ports or roads where she is to load or unload.

e. The ports which she is to enter.

f. The place from which the risk begins to run for account of the insurer.

g. The value of the ship insured.

All this holds good, apart from the exceptions which originate in further stipulations as detailed in this section.

2°. Fit subjects of Marine Insurance are especially the following. The hull or body of the ship, termed the keel, empty or loaded, armed or not, sailing alone, or in company with others, or with convoy; the tackle and apparel; implements of war; provisions and outfit and, in general, all that has been expended on the ship for

making her seaworthy; bottomry or respondentia interest; goods shipped on board; expected profits; the freight to be earned.

Insurance can be made on the whole or on a part of the above combined or separate; in time of peace, or of war, before, or during the voyage of the ship; for the voyage out and home, or either of them; for part or the whole of the voyage, or, for the time it is likely to cover, against all perils of the sea, collision etc., on good and bad news (lost or not lost). *

3°. In case of insurance on the ship, (which term means, in the policy, all kinds of sea-going vessels), without further specification, it is understood that the insurance covers the hull, body or keel, the tackle and riggings, the machinery (when a steamship), apparel, ordnance, munition, artillery, boats and other furniture and outfit. Under the terms furniture and outfit are comprehended the provisions put on board the ship, for the use of the crew on the voyage; the underwriters are, however, not liable for the consumption of such provisions, while the ship is detained by an embargo or other *force majeure*. In whaling voyages are comprehended under the term *outfit*, the fishing implements of the whaler, as harpoons, lances, spears, whale-lines etc., and the casks, cisterns, boilers etc., for the purpose of catching whales and seals and for preparing and containing the oil and blubber. In policies on whalers it is not unusual to describe the different interests insured in a fishing voyage. †

4°. When the assured does not know in what ship goods expected from abroad will be laden, the mention of the master or ship shall not be

* ARNOULD. Marine Insurance. Edit. David Maclachlan. 1877. Chapt. II. Merchant Shipp. Act. 1862, Sect. 54 & 55.

† ARNOULD. Marine Insurance. Chapt. II. Edit. 1877, p. 18 et seq.

required, provided it be declared in the policy that the assured is ignorant thereof, with notification of the date and the person who signed the last advice or letter of order. The interest is then declared in the Policy to be "*by ship or ships.*"

5°. When the assured is ignorant of the kind of goods, to be sent or consigned to him, he may have them insured under the general denomination of *goods or merchandise.* Such insurance does not include gold or silver coin, bars of gold or silver, jewels, pearls or valuables, nor implements of war. Goods carried on deck, as they are exposed to a greater hazard than goods carried in the ordinary way, are not covered by a general insurance, in the common form for goods and merchandise, and, in case of loss, would not be recoverable under a policy on goods in a general form; unless it be in virtue of a general custom of the particular trade, in which case the underwriter is presumed to be acquainted with the custom and to have undertaken the additional risk. It is, however, a generally adopted rule that such goods be specifically described in the policy, at all events, to apprise the underwriter of the extra risk he runs. *

6°. If insurance has been made on ships or goods, which had already arrived safely at the place of destination, at the time the agreement was closed, or on any interest which, at that time, had already sustained the damage against which it is insured, the general rule on insurance noted in the preceding section, sub-section 12°. is applicable to such cases, if, it be proved or presumption exists, that the underwriter was aware of the safe arrival, or the assured or his

* ARNOULD. Marine Insurance. Part I. Chapt. II. Edit. 1877, p. 27.

mandatary acquainted with the damage, when the agreement was made.

7°. The presumption alluded to above does not exist with regard to the assured, if the insurance has been made *on good or bad news*, provided, in that case, the last intelligence received by the assured about the object insured be mentioned to the underwriter, and that, if the insurance has been made for account of a third party, due evidence be shown, in case of damage, of the date of the order received by the mandatary to effect insurance. Insurance, with that condition, can only then be annulled when it is proved that the assured or his mandatary was aware of the damage, at the time the agreement was made.

8°. By several laws on Marine Insurance it is enacted that insurance on the pay or wages of the crew is void. *

Insurances are void if made—

a. On ships or goods, the full value of which has been previously advanced on bottomry.

b. On goods the trade in which is prohibited by the respective laws and regulations.

c. On ships, which are engaged in carrying on an illegal commerce.

9°. In the case of ships or goods, on which only a portion of the full value has been advanced on bottomry or respondentia, the surplus value alone may be insured, together with what would have to be paid as contribution to an average, on their safe arrival.

10°. When insurance has been taken on goods, partly charged with bottomry or respondentia, for the remainder of their value, the proceeds of the goods saved are, in case of abandonment,

* See, with regard to this principle, ARNOULD, Marine Insurance. Edit. Maclachlan, 1877, p. 43 et seq.

divided between the money-lender on bottomry or respondentia and the underwriter, in proportion to their respective interests. If however, in such case, the bottomry has been taken out as a matter of necessity, it has the preference before the insurance.

11°. Insurance can be taken on the hull of the ship, for the full value of the ship and all her appurtenances, as stated in sub-section 3, and including all charges incurred untill she is at sea.

12°. Insurance may be effected on ships and goods, which have already departed or removed from the place from which the risk would begin to run for account of the underwriters, provided the policy expresses either the exact time of the departure or forwarding of the ship or goods, or that the assured is not acquainted therewith. In all cases, on pain of nullity, the last intelligence which the assured has received respecting the ship or goods must be mentioned to the insurer, and, if the insurance is made for account of a third party, the date of the letter of order or advice, or the positive mention that the insurance takes place without order from the concerned.

13°. If the assured makes in the policy the declaration of ignorance, as required by sub-section 12°., and it appears afterwards that the insurance was made after the departure of the ship from the place from which the risk of the underwriter would begin to run, the assured must, in case of damage, at the demand of the underwriter, confirm upon oath his declaration of ignorance.

14°. If no mention is made in the policy of either the departure of the ship, or ignorance thereof, this is held to intimate, as acknowledged, that the ship was still lying at the port from which it was to proceed, when the last mail that arrived before the making of the policy left there,

or, if no regular postal commuication exists, then at the time when the last suitable opportunity of communication occured.

15°. If the insurance has been made on ships not yet arrived at the place from whence the risk must begin, or which are not yet ready to enter upon the voyage, or to take in the cargo,—or on goods not yet ready for immediate shipment,—mention of this circumstance should be made to the insurer, or of the assured's ignorance thereof, with notice of the advice or letter of order, or the declaration that none exists; besides, mention of the date of the latest accounts he has received concerning the ship or goods. The assured and his mandatary are bound, in the case of damage, to confirm by oath this declaration of ignorance, at the demand of the underwriter.

Insurance on Bottomry and Respondentia.

16°. Bottomry is a loan upon the ship; if the ship be lost, the lender loses his money, but if the ship arrives in safety, then he receives back his principal and also the premium or maritime interest agreed upon. *Respondentia* is a loan upon the goods, to be repaid to the lender together with maritime interest if the goods arrive, but not to be paid if they are lost. The insurable interest therefore of the lender on respondentia, stands on the same ground with that of the lender on bottomry, viz.: that he has a direct interest in the arrival of the goods (§ 75). * Loans on bottomry and respondentia, though themselves a species of insurance, may yet be the subjects of insurance, in as much as they are an interest exposed to risk from the perils of the sea.

In an insurance on bottomry and respondentia the amount of the capital lent and that of the

* ARNOULD. Marine Insurance. Edit. 1877. Part II. Chapt. II., pp. 40 & 86.

premium (Maritime Interest) must be mentioned, each separately, in the policy; if this has been omitted, the premium is held not to be insured.

Policies of Insurance on bottomry should contain the following particulars:—

a. The name of the borrower, even if he be the master.

b. The name of the ship by which the voyage is to be performed, and that of the master.

c. The voyage and place of destination.

d. Statement whether the money has been furnished at a place of loading, or in a port of shelter, for repairs required or for other necessary expenses.

17°. If the master is, on the voyage, under the necessity of taking up money on bottomry, the money-lender can have such bottomry insured even if an insurance has previously been made on the thing hypothecated.

18°. If a ship or goods, already insured, are engaged for bottomry or respondentia, without necessity and only in the interest of the borrower, * the money-lender acquires the rights (insurable interest) which the borrower would have had against the underwriter to the amount of the sum advanced. If, however, the money-lender has not had any knowledge of the insurance, and affirms this by oath, the underwriters on the bottomry or respondentia are not released, but the assured money-lender is bound, in case of damage, to cede to them the rights he would have on the insurers of the ship or goods, by virtue of legal subrogation. In case the money-lender directly sues the underwriters on the ship or cargo, the underwriters on the bot-

* See §§ 69 & 75.

tomry will be released with the restitution of the premium of insurance.

With regard to insurance on bottomry and respondentia, Arnould gives the following opinion. "The lender only, as appears by the nature of the contract, can insure the sum advanced. The condition of a bottomry bond is, that if the ship perishes the borrower pays him nothing; if it arrives safely, or perishes during or after deviation, or is sold or broken up at an intermediate port, he pays the capital and the maritime interest; the lender's capital and interest, therefore, being exposed to risk, are consequently insurable. It is otherwise if the terms of the loan make the money repayable in any event, it is then not insurable since there is no sea risk; but in that case it also ceases to be bottomry."

"The borrower clearly cannot insure the sum advanced, for the risk is upon the lender and not upon him; and as in case of loss he has nothing to pay, were he to receive the whole sum from the underwriters, he would have a direct interest in the destruction of the vessel. Of course, if the value of the whole interest of the assured in the adventure exceeds the amount of the sum which he has borrowed in bottomry, he may insure this surplus, though not as bottomry."

"Agreeably to the principles which guide them in the case of *future freight* and *expected profit*, the French writers and the French Legislature declare that, though the capital lent on bottomry may be insured, yet the maritime interest, which the lender on bottomry is to receive on the prosperous termination of the voyage, cannot be insured; because, as Pothier expresses it, such interest is a gain, which the

lender will fail to make if the ship perishes, and not a loss by the perils of the sea. *

"In this country (England) and also in the United States, a more liberal practice has prevailed, and both bottomry and respondentia interests may be the subjects of insurance."

"Respondentia and bottomry loans are not covered under the general denomination of goods and merchandise; they must be specifically named. Lord Mansfield put this on the ground that by the custom of merchants, respondentia is insured under a special denomination; but Kent, J., has also suggested, as a reason for the rule, that the risk is peculiar, as there is neither average nor salvage; and a capture does not mean a temporary taking only, but one that occasions a total loss."

"Yet, if it can be shown to be the usage in any particular trade to insure these interests under general words, they may be recovered under a policy containing such words only. On the ground of such a custom in the East India trade, a captain was permitted to recover, at respondentia interest, money he had laid out for the use of the ship,—under the general words goods, specie, and effects on board."

"Of course if the instrument of hypothecation be not in law what it is described in the policy to be, the policy is invalid. The Court of Common Pleas, therefore, upon the construction of such an instrument, being of opinion that it was not in law a bottomry bond, because it made the lender's claim under it depend, not on the arrival of the ship, but on the arrival of the master, held

* POTHIER, D'Assur. Ed. Estrangin No. 32, p. 40. In Hamburg such insurance is permitted, both by the Ordinance of 1731 and the Regulations of 1847. The same is the case in Prussia and in Holland. Spain and Sardinia follow the French rule. See the foreign law collected in Nolte's Benecke I. 295 and 296.

that the lender could not recover under a policy 'on bottomry.' The Court of King's Bench, sitting in appeal, admitted that, had the Court of Common Pleas been correct in their construction of the instrument, the policy as framed would not have covered the interest of the lenders. Accordingly, where the money borrowed was secured by bills on the owner, and by an instrument which purported to be an hypothecation of ship, cargo, and freight, but, in effect, was an unauthorized mortgage of these interests, the Court held, that the lender had no insurable interest in the ship." *

Valuation of goods including Insurance, premium and Customs duties.

19°. Goods may be insured for the full value they have at the time and place of shipment, with all charges till on board, including the premium of insurance. No separate valuation of each thing insured can be demanded. The actual value of the goods insured may also be augmented with freight, import-duties and other charges, which must necessarily be paid on their safe arrival, provided this be mentioned in the policy. If the thing thus insured, does not arrive at its destination, this augmentation is not binding, in so far as the payment of freight, the import-duties and other charges are then entirely or partly obviated. But if the freight has had to be paid in advance, according to the agreement made with the master before his departure, the insurance holds good with respect thereto. In case of disaster or damage, the fact of payment in advance must be proved.

Insurance of expected profits and commissions.

20°. With regard to expected profit and commission, as subjects of insurance, Arnould makes the following statements. "The same reason which led to the prohibition of insurance in France

* ARNOULD, Marine Insurance, Edit. Maclachlan, 1877, p. 40 et seq.

on freight (infra No. 25) led to the prohibition of insurance there on expected profit." *

"In Hamburg, in Holland, in Sweden, in Portugal, in Italy, in the United States and in England insurances on expected profits are lawful. The grounds on which they are so considered are expressed, with admirable force and clearness, in the following passage taken from the judgment of Lawrence Jr., in the case of Barclay v. Cousins. As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure, the adventurer is liable to be deprived, not only of the things immediately subjected to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. If they do not arrive, his loss is not merely that of his goods, but of the benefits which he might obtain, were his money employed in an undertaking not subject to the perils. If it be allowable for the merchant to protect capital, subject to the risk of maritime commerce, by insuring it, why may he not protect those advantages he is in danger of losing by their being exposed to the same risks? It is surely not an improper encouragement of trade to provide, that merchants, in case of adverse fortune, should not only not

* See EMERIGON I, Ch. VIII. § 9, pp. 236–239, and the commentary of Boulay-Paty. See also Ord. de la Marine. Liv. III. T. 6. Art. 15. Code de Commerce. Art. 347. Spain and Sardinia followed the French Code in entirely prohibiting insurance on profits. Such insurance is also illegal in Denmark. In Holland, insurance on profits has long been practised, and is now permitted by law, on condition that the expected profits are separately valued in the policy and the goods specified, out of which they are to be derived. Nolte's Benecke, I. 301 and 302.

lose the principal adventure, but that the principal should not, in consequence of such bad fortune, be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce, by their having the means of preserving their capitals entire."

"Such are the principles upon which insurances on expected profits are allowed in England. Profits may be insured equally by valued and by open policies. But, whether insured by one or the other, it is the law of this country, that the assured cannot recover unless he prove that, but for the intervention of the perils insured against, some profit would in fact have been realized by the sale of his goods on arrival. He must also prove that the goods, from the sale of which the profits were expected, have at one time or other, during the period covered by the policy, been actually exposed to the perils insured against, and also that he was legally interested in them at the time of the loss. The foundation of the insurance is not a bare expectation of interest in a subject with which, at the time of effecting the insurance, the assured was not connected, but an expectation of profits on goods, at that time his."

Commission.

"A party may also insure the sums which he is to receive by way of commission on the sale of merchandise; and, if the merchandise, on which the commissions were to arise, was only prevented from arriving by the perils insured against, the assured may recover to the extent of his loss, provided it appear that the goods were actually on board at the time of the loss."

"Profits or commissions are not covered by a policy on *goods* or *merchandise;* they must be specifically named. This rule is absolute in

England. In the United States it appears to have been held, that a right to a certain percentage, proportion or share of a cargo as commissions on profits, is covered by a policy on property."

"Lloyd's form of policy is adapted, as usual, by insertion of the words *profits* or *commissions* in the margin; or in the valuation clause, adopting or adapting the language of the clause, according as the subject of the policy is valued or not." *

Valuation of Expected Profits.

21°. Thus insurance on expected profits and commission must be separately valued in the policy with special designation of the goods on which it is made. Where the general value of the things insured has been expressed in the policy, with the positive stipulation that any excess of the value of the goods shall be considered as expected profit, the insurance is valid for the value of the things insured; the remainder, however, shall be reduced to the provable extent of the profit expected, estimated according to the rule mentioned in sub-sections 22 and 23.

22°. Expected profits may be proved by acknowledged price-currents, or in the absence of these, by a valuation made by competent persons showing the profits which the insured goods could rationally have been expected to yield on their safe arrival at the place of destination after an ordinary voyage.

23°. If it appears by the price-currents or by the valuation made by competent persons, that, in case of safe arrival, the profit would have been less than the sum which the assured had stated in the policy, it may suffice that the underwriter should pay that reduced amount. Nothing is

* ARNOULD, Marine Insurance, Edit. Maclachlan, 1877, p. 38 et seq.

owner has this inchoate right, directly there is an inception of performance by the ship under the charter-party. When it is the price to be paid for the carriage of goods in the ship, then this inchoate right accrues directly the goods of the merchant are actually put on board, or are even contracted for and ready to be put on board, and the ship is ready to receive them. In either case the ship-owner has put himself in a condition to earn freight, and he will earn it, provided either the ship, which he has thus let out to the freighter, or the goods, which he has thus engaged to transport for the merchant, arrive safely at their destination. If, by the perils of the sea, they are prevented from thus arriving, the ship-owner has no claim to freight from the merchant, in other words, he is prevented, in that case, by the perils of the sea, from realizing that which, but for the intervention of those perils, he would certainly have earned. It is but fair and reasonable, therefore, that he should have the means of protecting himself, by a policy of Marine Insurance, against the loss he is thus exposed to."

"Such are the general principles upon which, in England, in America, and in many of the Continental States, the ship-owner is allowed to effect an insurance on that freight which he expects to earn, and which he is only prevented from earning by the perils insured against."

"But the French Legislature, proceeding rather on scholastic refinements than mercantile considerations, have prohibited all insurance of expected or future freight * on the ground that expected freight is a mere contingency in which there is no present existing interest; that it is

* *Fret à faire.* Ord. de la Marine, Liv. III. Tit. VI. Art. 15. *Fret des merchandises existant à bord.* Code de Comm. Art. 347.

but a gain which the assured may miss making, not a property which he can risk losing."

"But, although the prohibition is absolute against the insurance of expected freight *(fret à faire)*, yet the French Legislature permits the insurance of freight actually earned *(fret acquis)*. The French jurists have refined much in explaining the meaning of this term; but upon the whole, by *fret acquis* may, it seems, be understood, either sums paid in advance by the charterer or his agents as a part of the freight; or freight which, by the terms of the charter-party, is payable in all events. * But in these cases the charterer, and not the ship-owner, can alone insure, as he alone runs the risk of loss. The term appears also to extend to freight actually earned by the unloading of a portion of the cargo at a port of delivery, short of the port of ultimate destination."

"There can be no doubt that sums paid by the charterer or his agent, as an advance of part of the freight, are also insurable by him in this country. The only question is, whether he can insure them under the general term freight, or must describe them specifically in the policy, and this depends on the particular terms of the charter-party."

"It was laid down by Lord Kenyon, at Nisi Prius, that freight could not be insured for part of the intended voyage; but this position, unjustified by principle, was subsequently overruled by Lord Ellenborough and the Court of King's Bench, and it is now quite clear that freight, like any other subject, may be insured either for part or the whole of the voyage or of the time over which it is likely to extend."

* The "Freight due to the ship, ship lost or not lost" clause.

"Freight must be insured *eo nomine* in the policy, either by inserting the words '*on freight*' in the margin, or appending them at the foot of the instrument. Such a policy would cover not only freight in its strictest acceptation, but the chartered hire of the vessel, the increased value to the owner from carriage of his goods in his own ship, and, we have very little doubt, payments made in advance on account of either the first or the second of these classes of freight."

"It has been doubted in the United States whether a charterer who hires a vessel for a voyage at a certain rate per month, payable on completion of the voyage, can insure the benefit he derives by the employment of the ship in carrying the goods of other persons on freight, under a general policy on freight; it has also been there doubted, whether such general policy will cover the interest of a party who has sold his vessel, reserving to himself a right to receive the freight for the voyage insured. The ground of this doubt is the same in both cases; that in neither has the assured the same stake in the safety of the ship as though he were owner; and that, therefore, his effecting a general insurance on freight is an imposition on the underwriters, who, when they are asked to insure freight generally, must presume that they are dealing with the owner of the ship."

"The objection, however, does not appear to be well founded; for the interest of the assured in both the cases supposed seems, as far as the freight is concerned, to be precisely equivalent to that of the owner; in fact, charterers so circumstanced must be regarded as owners *pro hâc vice*, having, at least, as much interest in the ship arriving so as to earn freight, as the owners would have, if insured to the full value of the

freight to be earned. No doubt, as Mr. Phillips has observed, when the charterer is bound to pay a fixed or lump sum to the owner, and is himself entitled to receive freight from the shippers of goods by the chartered vessel, the *amount* of his insurable interest in freight would only be the difference between what he has to pay and what he has to receive, *i. e.*, in case both sums are subject to the same contingency." *

XIII.—*Average.* †

General Principles.

§ 63. Under the term *Average* are included all extraordinary expenses incurred for the good of the ship and the cargo together or separately, and all damage caused to the ship or goods, during the time fixed for the beginning and ending of the voyage or during the term covered by an insurance policy.

If not otherwise agreed upon between parties, average may be adjusted according to the following rules.

1°. There are two kinds of average: Gross or General Average, and Simple or Particular Average. *General Average* is assessed on the ship, the freight and the cargo, and contributed, *pro ratâ*, according to the respective values of the associated interests, forming a common marine adventure, "in order that no particular individual amongst them, who may have been forced to make a sacrifice for the preservation of the ship or cargo, or both, should lose more than his own share." ‡

* ARNOULD. Marine Insurance, Edit. Maclachlan, 1877, p. 31 et seq.

† Regarding the origin, meaning and history of the term Average, as used in Maritime Law, see the excellent note of David Maclachlan of the Middle Temple, Barrister-at-law, Editor of Arnould's Law of Marine Insurance, in the edition of 1877, p. 880 et seq.

‡ LEONE LEVI. Intern. Comm. Law, Edit. 1863. Vol. II. p. 870.

Particular Average falls entirely upon the particular owner of the property lost or deteriorated by the damage or benefited by the expenditure, and such owner, if insured, has a claim against the underwriter in proportion as stated in sub-section 12. *

General Average. 2°. *General Average* includes the followiug contingencies :—

a. Whatever has been given to the enemy, or to pirates, for the release or ransom of ship and cargo. In case of doubt, the ransoming is always held to have taken place for the benefit of both ship and cargo.

b. What has had to be jettisoned for the preservation or the common good of ship and cargo.

c. Cables, masts, sails, and other stores, which have been cut or broken, for the same purpose.

d. Anchors, cordage and other articles which, for the same purpose, it was necessary to slip, or part with.

e. The damage caused, by the jettison, to the goods remaining on board.

f. The damage purposely done to the body of the ship, to facilitate the jettison and lighterage or saving of the goods, or to promote the getting rid of water, and the damage then caused to the cargo by such acts.

g. The attendance, cure and maintenance and the indemnification of all persons on board, who have been wounded or maimed in defending the ship.

* LEONE LEVI. Vol. II. page 878.

h. The indemnification or the ransom of those who, having been sent out to sea or sent on shore for the service of the ship or cargo, have been captured, kept prisoners or enslaved.

i. According to several Codes, the wages and maintenance of the crew, during the time the ship has been obliged to stop in a port of shelter. *

j. The pilotage and other harbour dues to be paid on entering and leaving a port of shelter.

k. The rent of the warehouses and stores, in which those goods had been deposited which could not be kept in the ship whilst the repairs in a port of shelter were being executed.

l. The charges of reclaiming, if the ship and cargo are detained or brought up and both are reclaimed by the master.

m. The wages and maintenance of the crew during such reclaiming, if ship and cargo are released. †

n. The charges of unloading and lighterage, together with those of bringing the ship into a port or river, when she is compelled to put in by storm, pursuit by enemies or pirates, or through any other cause, to save ship and cargo; and also the loss or damage sustained by goods through their being discharged and reloaded, in case of need, in lighters or boats, and their reloading in the ship.

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* See on this ARNOULD'S Marine Insurance. Edit. Maclachlan, 1877. p. 842.

† ARNOULD. Idem. p. 844.

Voluntary Stranding.

o. The damage caused to the ship or to the cargo, or to both, if the ship has been purposely run on shore, in order to prevent her capture or perishing, and equally so, if this has taken place under any other threatening danger, to save ship and cargo. *

p. The charges and cost of assistance to set the stranded ship afloat again, in the case above alluded to, and remuneration for all special services rendered to prevent the loss or capture of the ship.

q. The loss or damage sustained by the goods, which, in case of distress, have been put in lighters or boats, including the share in the general average due by the goods to such lighters or boats, and, reciprocally, the loss or damage caused to goods which have remained in the orignal ship, and to the ship herself after the lighterage, for as much of such damage or loss as belongs to general average.

r. The wages and maintenance of the crew, if, after the beginning of the voyage, the ship is detained by a foreign power, or by the breaking out of a war, as long as ship and cargo are not released from all reciprocal engagements. †

s. The bottomry premium (maritime interest) of sums raised to defray expenses pertaining to general average.

t. The premium of insurance to cover expenses pertaining to general average,

* See with regard to *Voluntary Stranding*, ARNOULD. Edition, Maclachlan, Vol. II. pp. 834–838. With regard to the existing practice among adjusters in England on Voluntary Stranding, see RICHARD LOWNDES, the Law of General Average. Edit. 1872. page 77 et seq.

† ARNOULD. Edit. Maclachlan. 1877. p. 844.

or the loss sustained by the sale of part of the cargo, in a port of shelter, to cover those expenses.

u. The charges incurred for the valuation and adjustment of the general average.

v. The expenses, including the augmented wages and the maintenance of the crew occasioned by an unusual quarantine, not foreseen at the closing of the affreightment, so far as the ship, and the articles composing the cargo, are subject thereto.

w. Generally, any sacrifice, after due deliberation, purposely and intentionally rendered in distress, as the only alternative for the preservation and common good of ship and cargo, and undertaken on account of the common adventure, with a view to avert total loss of the whole, and any loss sustained as a direct consequence of such sacrifice and the expenses incurred, under such circumstances. Thus may be defined what is called an *act of general average* in law.

3°. If internal defects of the ship, her unfitness for the performance of the voyage, or fault or neglect of the master or crew, have caused the damage or expenses, these latter are not general average, although willingly incurred for the good of ship and cargo after requisite deliberation. Again, an act which would fall within the compass of the ordinary duties of the shipowner cannot be regarded as a general-average act. The danger may be pressing and the efforts to escape it may be attended with loss, but if the means employed are such as come within the ship-

owner's contract to employ the loss falls upon him only. *

Particular Average.

4°. A *particular average* loss is such loss or damage as is accidentally caused to the subject insured, by the perils insured against. † Such are the following contingencies:—

a. All damage and loss caused to the ship or to the cargo, by storm, capture, shipwreck or accidental stranding.

b. Salvage and the disbursements made in saving ship and cargo.

c. The loss of and the damage caused to cables, anchors, cordage, sails, bowsprit, topmasts, yards, boats, and shipstores, by storm, or other mishaps at sea.

d. The charges of reclaiming, and the maintenance and wages of the crew during the reclaiming, if only the ship, or the cargo alone, have been seized.

e. The special repairs of casks and the expenses for putting in order damaged merchandise, so far as they are not the direct consequence of any casualty which constitutes general average.

f. The surplus freight and the charges of loading and unloading, which have to be paid if the ship is condemned during the voyage, in case the goods are forwarded by another vessel, for account of the shippers, according to the rule mentioned in § 72, sub-section 15°.

g. Generally, all damages, losses and expenses, which are not caused or occasioned expressly or purposely by care

* ARNOULD. Marine Insurance. Edit. Maclachlan. 1877. p. 812.

† ARNOULD. Idem. p. 888.

for the common safety of ship and cargo, but on behalf of the ship alone, or for the cargo alone, and which, consequently, according to the rules mentioned in sub-section 2°. do not belong to general average.

General and Particular Average with regard to goods in lighters.

5°. When a ship is prevented, by existing shoals, shallows or banks, from leaving the place of departure, or reaching her place of destination with her full cargo, and a part thereof must thus be conveyed to the ship by, or discharged in lighters, such lighterage is not considered as average. The expenses come to the charge of the ship, if no other agreement has been made by the bills of lading or charter-party.

6°. The rules respecting general and particular average, stated above, likewise apply to the lighters just mentioned and the objects loaded in the same.

7°. If, during their navigation, any damage comes to the lighters or to the goods loaded therein which belongs to general average, one third thereof is sustained by the lighters, and two thirds by the goods which are on board of them at the time. These two thirds are afterwards assessed as general average on the ship, the freight and the whole cargo, including that on board the lighters.

8°. Reciprocally, the goods laden in the lighters continue, in common with the ship and the remainder of the cargo, to participate in the general average which may have come to the ship and the cargo, till the moment the goods laden in the lighters shall have been landed at their place of destination and delivered to the consignees. *

* The rules mentioned in sub-sections 7 & 8, as adopted on the Continent of Europe and America, do not always govern English practice. See RICHARD LOWNDES. The Law of Average. Edit. 1872, page 175 et seq.

9°. Goods not yet laden either in the principal ship or in the lighters employed to convey them to her, do not, in any case, participate in the casualties befalling the ship, in which they are to be laden.

Averages for which the Master is liable.

10°. Damages caused to the merchandise, in consequence of the master having neglected to close the hatches, to make the ship properly fast, or to provide proper implements for hoisting, and all other misfortunes, caused by neglect or carelessness of the master or crew, are particular averages, for which the shipper has recourse on the master, on the ship and the freight.

Average accustomed.

11°. Sometimes bills of lading contain a provision for the payment of *average accustomed*. These so-called *petty averages* cover the small charges, which occur regularly in the usual course of the voyage, and which the master, in the ordinary course of his duty, necessarily pays for the purposes of the ship and cargo. Such are the ordinary charges at the place of loading and unloading and during the voyage, as common pilotage, towage, tonnage dues and dues for entering and leaving harbours and rivers, tolls of passage or departure, all tonnage, anchorage, beacon or light dues, and all other duties relative to navigation; ordinary quarantine (see above sub-sections 2°. *v.*), signals, instructions, expenses for digging a ship out of the ice, when frozen up in the regular course of the voyage, etc. These charges are, in some cases, borne, one third by the ship and two thirds by the cargo, or otherwise as agreed upon by the bill of lading or the charter-party, but they can never come to the charge of the underwriters, unless in the particular case of their being the consequence of unforeseen and extraordinary contingencies, occurring during the voyage, or necessitated to

relieve the ship and cargo from impeding danger; in which cases they are, as stated above, considered to be general average. *

12°. "The true method," says Arnould, "of ascertaining the amount which the underwriter ought to pay, in order to idemnify the assured for a particular average loss on goods, arriving sea damaged, depends mainly on the following elementary principle of insurance law, that the value upon which the premium is paid, is, as between the assured and the underwriter, the sole value to be regarded, in estimating the amount of the underwriter's liability:—he pays no loss upon that for which he receives no premium." † *Arnould's principle of Average.*

Each separate underwriter pays only upon the actual sum subscribed by him. If five underwriters have each subscribed £200 on a policy on goods valued at £1,000, and if the goods arrive damaged to the extent of one fourth, each underwriter will have to pay one fourth of £200, as his quota, to make good this loss. The five underwriters pay collectively £250, or one fourth of £1,000, the estimated damage. *Total loss on goods.*

To estimate the particular average to be paid by an underwriter, who has insured goods, *for all risks*, the following rules are applicable:—

a. Whatever has, on the voyage, been robbed or lost, or sold on account of damaged condition, occasioned by perils of the sea or any other cause which has been insured against, is estimated at the prime cost of the goods, that is, at the invoice-price at the port of loading with all expenses incurred until the goods in question were put on board, also in-

* ARNOULD. Marine Insurance. Edit. Maclachlan, 1877, p. 888. LEONE LEVI. Intern. Comm. Law. Edit. 1863, Vol. II. p. 878 et seq.

† ARNOULD. Edit. Maclachlan, 1877, p. 889.

cluding premium of insurance; or else, in the case of a valued policy, the losses above mentioned are estimated according to the value for which the goods are insured in bulk, as expressed in the policy.

Goods warranted free of average. Adjustment of damages.

b. If insured goods, warranted free of average, are found, on arriving at their destination, to be partly or wholly damaged, competent persons determine what the goods would have been worth if they had arrived in good condition, and further what their value may be in their present condition. In both valuations, the gross produce of both the sound and the damaged goods is to be taken into account. The underwriter is liable to the extent of the amount of the prime cost of the goods as laid down on board, or so far as the value stipulated in the policy is concerned, having accepted the risk that the goods might or might not arrive safe. He has nothing to do with the market-price of the goods at the port of arrival, and consequently the underwriter does not pay the difference between the two above named valuations, but only such part of the sum insured, as stands in proportion to the diminished value of the goods, as ascertained by those valuations. The object in comparing the valuations, of the sound and damaged goods, respectively, is not to ascertain the direct amount of the merchant's loss, but its relative amount, the proportion which it bears to the price at which the goods would have

sold if sound. Or, as Arnould puts it more clearly, "the question is not whether the depreciation amounts to any given fixed sum, but whether it amounts to one half, one fourth or one tenth of the sum for which the goods would have sold, if sound; whether the commodity is one half, one fourth or one tenth the worse for the sea damage; when this is ascertained, the liability of the underwriter is ascertained also, for he pays the same proportional part, whether it be one half, one fourth or one tenth of the prime cost on board (as stated above), or of the value stipulated in the policy. Thus the sum which the underwriter will have to pay will depend solely on the relative extent of the loss, and will be the same whether the goods arrive at a gaining or losing market." *

* This will be obvious from the following example. Let the prime cost of the goods be £500. The amount of loss by sea damage be half the sum for which they would have sold, if sound. The profit or loss be half the prime cost. Then,

(1) On a losing market:—

Produce of sound sales (there being 50 per cent. loss on prime cost),	£250
Produce of damaged sales (being half the sound value),	£125
Difference between sound and damaged sales (*i. e.* merchant's loss),	£125

But £125 is one half, or 50 per cent. on £250 (the proceeds of the sound sales), the underwriter pays one half or 50 per cent on £500 (the prime cost), *i. e.* he pays £250

(2) On a gaining market:—

Produce of sound sales (being 50 per cent. over prime cost),	£750
Produce of damaged sales (being half the sound value),	£375
Difference between sound and damaged sales (merchant's loss)	£375

But £375 is one half, or 50 per cent. on £750 (the proceeds of the sound sales); the underwriter pays one half, or 50 per cent. on £500 (the prime cost), *i. e.*, he pays £250 as before.—ARNOULD. Vol. II. p. 892.

"In short, that which the assured loses by the depreciation of his goods, is an aliquot part of the market value for which they would have sold, had they arrived sound at their port of destination; that which the underwriter pays in respect of such loss, is the same aliquot part of their prime cost or value in the policy. Thus, if the damage amounts to half the sound value of the goods, the underwriter pays half the sum he has agreed to insure; if to a third, then he pays a third of that sum, and so on in exact proportion to the extent of the depreciation."

With regard to English Law, Arnould makes the following further remarks. "Even after this rule of adjustment was established, it was for some time doubted whether the amount of depreciation on the sea-damaged goods was to be ascertained by comparing together the net or the gross produce of the sound and damaged sales. The question came on for consideration in the Court of King's Bench, when it was established by Lawrence, J., in one of the ablest judgments ever delivered in Westminster Hall, that the true rule of adjustment is, that the percentage, or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound, with the gross produce of the damaged sales; and this is now invariably acted on in practice as the true rule of adjustment." *

The expenses incurred in obtaining an estimate of the damage and all extra charges occasioned by the sale of damaged goods by auction, brokerage, commissions etc., are added to the loss, and are chargeable on the underwriters.

* ARNOULD. Edit. Maclachlan, 1877, p. 893.

c. To this is to be added the estimated *expected profit*, if this has been insured.

13°. The underwriter cannot, in any case, compel the assured to sell the objects insured for the purpose of ascertaining their value, unless it were otherwise agreed upon in the policy.

14°. The loss is valued and adjusted at the place of destination, and the laws and customs existing there must be complied with, if the vessel and cargo arrive there, on the principle of *locus regit actum*. If the vessel does not reach its destination, then the law of the place where the voyage ended must be followed. This rule of *locus regit actum*, applies only to acts of inspection, valuation and adjustment of the actual damage and depreciation, and does not infringe on the *lex loci contractus*, which governs the contract of insurance as a whole and in its constituent principles. If the insured goods arrive at the place of destination in a damaged or deteriorated state, and the damage is visible outwardly, the inspection of the goods and valuation of the damage must take place by competent persons before the goods come under the control of the assured, in conformity with the law and custom existing there *(locus regit actum)*. If the damage or diminution is not outwardly apparent at the discharge, the inspection may take place after the goods have come under the control of the assured, provided it be done within the space of time and term, as fixed by the respective law, after the discharge; without prejudice to what further evidence may be found necessary at the instance of either party.

15°. If not otherwise required by the *lex loci* Rule for *contractus*, in case of damage to an insured ship, caused by perils of the sea, the underwriter

bears only *two thirds* of the estimated costs of repairs, whether these repairs have actually taken place or not, and this in proportion of the insured to the uninsured part. One third remains for account of the assured, as equivalent of the presumed amelioration caused by substitution of the new for the old. In the case of iron ships, however, this rule is never resorted to.

If the repairs have taken place, the amount of the costs thereof is proved by accounts and any other evidence, and, if need be, by an estimate of competent persons. If the repairs have not been executed, the amount of the same is estimated by competent surveyors. When it appears,—if necessary, after the hearing of competent persons,—that the value of the ship has increased through the repairs by more than one third of its primitive value, the underwriter pays, in the proportion mentioned above, the full amount of expense for repairs, with deduction of the amount of increased value.

If, on the other hand, the assured proves,—if necessary, after inspection by experts as aforesaid,—that the value of the ship has not been improved or increased in any way by the repairs through her being new, and having suffered the damage on her first voyage, or if the damage occurred to new sails or new ships-stores, or to anchors, chain-cables or new copper-sheathing etc., then the deduction of one third does not take place and the underwriter is bound to indemnify the whole cost of the repairs in proportion of the insured to the uninsured part.

Cases where repair exceed three fourth of the value, or other portion as stated by the lex loci contractus.

If the estimated costs of repairs should amount to more than three fourths of the value of the ship, (or otherwise, as required by the *lex loci contractus*), she may, with respect to the underwriter, be held to be condemned; and the underwriter

is then bound, if no abandonment has taken place, to pay the sum he has insured to the assured, with deduction of the value of the damaged ship or wreck. * (§ 65, sub-section 1).

16°. In the case of a ship which reached a port of shelter, and, after repairs there, is subsequently lost, (by whatever cause this may occur), the underwriter, as a general rule, is not liable for more than the payment of the sum insured by him. The same rule applies, in a general sense, if a ship has, by several repairs, expended more for this purpose than the sum insured. † *Aggregation of losses.*

17°. The underwriter is, as a general rule, not bound to support any general or particular average, if this, exclusive of the costs of inspection, estimation and adjustment, does not amount to one per cent. of the value of the damaged object; unless parties have agreed otherwise.

18°. The underwriters pay as much for general average, as the vessel, the freight or the cargo,—for as much as respectively insured,—have to participate in the general average, and that in the proportion of the part insured to the uninsured part.

19°. The general and particular average being adjusted, the account of damages and loss and the vouchers relating thereto, must be delivered to the underwriters. These are bound to pay what is due by them within the time and term fixed by the *lex loci contractus*, and are from the expiration of that time liable to legal interest in conformity with that law.

* By English Law there is no absolute proportion fixed; See ARNOULD, Marine Insurance. Edit. 1877, Vol. II. p. 1001.

† In English and French Laws this rule is not observed, *aggregation of losses* being recognized: See ARNOULD, Vol. II. p. 942 and NOLTE's Edition of BENECKE, Vol. II. pp. 191–193.

§ 64. On assessment and apportionment of gross or general average contribution, the following rules are applicable in most cases.

1°. The adjusting and assessment of general average is, like the valuation of losses and damages, done at the place where the voyage ends unless parties have otherwise agreed (§ 63, sub-section 14).

2°. The estimation and assessment of general average are made at the request of the master and by competent persons. The experts are appointed by the parties, or by the respective Consul, at the place where the estimation and assessment must be made. The experts must be sworn before the respective Consul or local authority previous to the commencement of their work, and the assessment must be sanctioned by the respective Consul, if required by the law of the State to which the vessel or parties belong. Where there is no qualified Consul, the general average is adjusted by the competent local authority.

3°. In case of a total cessation of the voyage on the way, or of sale of the cargo in a port of shelter, the claim, adjustment and assessment of the loss are made at the place where such cessation or sale occurs.

4°. If the master neglects to make the claim mentioned in sub-section 3°., the owners of the ship, or also those of the goods, are qualified to make the claim themselves, without prejudice to their claim on the master for indemnification.

5°. General average contributions are borne as follows:—

a. By the value of the ship, in the state in which she arrived, with addition of amount of compensation gained by the general average contribution.

b. By the freight money, less the amount of the wages and of the maintenance of the crew.

c. By the value of the goods which, at the time when the damage occurred, were actually on board or in the lighters or boats, or which, before the disaster, have either been thrown overboard in peril, and made good, or have had to be sold to cover average charges.

d. Specie contributes to the general average according to its rate of exchange at the place where the voyage ends.

6°. As a general rule, the goods are estimated at their value at the place of discharge, after deduction of freight, import duties, and charges for unloading, together with their particular average during the voyage if any. This rule suffers exception in the following cases :—

a. If the adjustment and assessment must be made at the place whence the ship departed, or should have departed, the price of the goods is fixed at the value which the goods had at the time of shipment, plus the charges on the goods laid down on board, but exclusive of the premium of insurance ; and, if the goods are damaged, at their actual value.

b. If the voyage is entirely stopped in a foreign port, or the goods are sold, and the average cannot be adjusted there, then the price which the goods are worth on the way, or their net proceeds at the place of sale, is taken as contributing value.

7°. The goods thrown overboard are valued at the market-price of the ship's place of discharge, after deduction of freight, import duties, and ordinary charges; the quality, kind and conditions of such goods are to be made out by the bills of lading, invoices, and other evidence.

8°. If the kind or quality of merchandise has been inaccurately described in the bill of lading, being of greater value than that mentioned in the bills of lading, then the contribution is fixed in the assessment of general average according to the real value of the merchandise. But in the case of jettison, losses are made good according to the quality mentioned in the bills of lading. If goods are of a lower quality than that stated in the bill of lading, they contribute, nevertheless, to the general average according to their real value. The goods are made good at the rate of their real value, if they have been sacrificed in jettison.

9°. The provisions, the clothes of the crew, the daily clothes of the passengers, and also the ammunition required for the defence of the ship, do not contribute to the general average. But all articles of this description which have been thrown overboard by jettison, are made good through assessment of all the saved merchandise.

10°. For goods for which no bill of lading of the master exists, or which are not mentioned in the manifest, no compensation is paid, if they have been thrown overboard; but they contribute to the assessment in the loss if they have been saved.

11°. Goods laden on deck likewise contribute to the general average, if they have been saved. If the master has placed the goods on deck, without the knowledge or consent of the shipper, and the same have been thrown overboard or

damaged by the jettison, the shipper has the right of claiming assessment for compensation, which gives a right of recourse to all parties concerned against the ship and the master.

12°. In case the ship is lost, notwithstanding the jettison of goods or cutting of ship's rigging, no assessment for compensation takes place, and the goods, saved or rescued, are not liable to payment or compensation of loss sustained by the things thrown overboard, damaged or cut.

13°. If the ship is saved by the jettison or cutting, and is lost afterwards in the prosecution of her voyage, and goods are then saved, the goods thus saved, are alone liable to the jettison, for the value they may then have, after deduction of the salvage dues.

14°. If the ship and cargo are saved by cutting or other damage caused to the ship, but the goods perish or are robbed afterwards, the master has no claim on the owners, shippers or consignees of the goods, for contribution to the assessment, in consequence of such cutting or damage.

15°. If the goods are lost, by the fault or act of the shipper or consignee, they nevertheless contribute in the assessment of general average.

16°. The owner of a cargo need not, in any case, bear a greater share in a general average, than for the value which the goods have on their arrival; with the exception of such expenses as have been, *bonâ fide*, incurred by the master, even without authorization, after the loss of the ship, or the bringing up or seizure of the goods, to recover some part of what was lost, or to reclaim the goods brought up; even if it has been done without any good result.

17°. If, after the assessment, the goods thrown overboard have been recovered by the owners, the latter are bound to return, to the master and the

parties concerned in the cargo, what has been assigned to them for the same by the adjustment, under deduction of damage, charges, and salvage. In such case the ship and parties concerned participate in what is thus brought in, in the same proportion in which they have contributed for the loss by the jettison.

18°. If the owner of the goods, thrown overboard, recovers the same and does not claim any indemnity, he is free from contributing to any general average which, after the jettison, befalls the goods which have remained safe.

With regard to English Law on general average, Sir Robert Phillimore makes the following statements. "When the preservation of the ship has required the throwing overboard or sacrifice of a portion of the goods, equity demands that a general contribution be made by all towards a loss sustained by some for the benefit of all; and this is called in England by the name of *general average*."

"The Law on this subject was transplanted from the maritime code of Rhodes into the Roman Law, as follows:—*Lege Rhodia cavetur, ut, si lavandae navis gratiâ jactus mercium factus sit, omnium contributione sarciatur quod pro omnibus datum est.*" *

"According to the English Law," all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested." (*Birkley v. Presgrove*, 1 East's Rep. 220).

"It has been decided by the English Courts, that a claim for contribution to general average arises only where a part of the cargo is sacrificed

* DIG. L. XIV. T. II.

for the preservation of the ship and the rest of the cargo from an impending danger, not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea. *(Hallett v. Wigram, 1850. 9 Manning & Scott's Common Bench Rep. p. 580).* *

"The principle of this rule has been adopted by all commercial Nations, but with considerable variation in practice as to the kind of losses which demand its application, and as to the nature of the interests compellable to contribute. The question, therefore, may arise, and has arisen: *What law ought to bind the underwriters to reimburse a contribution exacted in a foreign port.* The English cases have established the following propositions."

"First, with respect to what law shall govern the construction of the insurance covenant as to what is general average. In the former edition of this work it was stated: that it had been decided, after much doubt and consideration, that the insurer of goods to a foreign State is not liable to indemnify the assured, though a subject of that State, who has been obliged, by a decree of a competent Court of that State, to pay a contribution as for general average, which by the law of England is not general average, unless it be proved, as a fact in the case, that the insured and insurer contemplated in their contract the general usage amongst merchants, or the usage of the port in which the general average was struck. The North American United States' cases are in accordance with this doctrine."

"This principle, however, seems to have been reversed, in the recent and important case of

* Sir ROBERT PHILLIMORE. Comm. Vol. IV. Note p. 638.

Dent v. Smith,* which has been since, more than once, approved by the English Courts."

"In that case the plaintiffs effected a policy of insurance in London with the defendants, on five boxes of bar-gold, in the ship called the *Dutchman*, which became a Russian ship, at and from London to Constantinople, including all risks from the Bank of England until safely delivered to the consignees at Constantinople. The perils insured against were the usual perils, including those of the seas, with the usual 'suing and labouring clause.' The ship sailed with the gold and other cargo on board, and was stranded in Turkish territory, about 100 miles from Constantinople, and within the jurisdiction of that port. The gold was immediately landed by the Captain, and deposited with the Russian Consul; and the consignees were compelled, in order to obtain it, to make a deposit of 20 per cent., upon the gold, as security for the payment of any sum that might be awarded against them as *average* or *salvage* expenses by the Russian Consular Court. In Turkish territory, by capitulations with the Great Powers, all matters touching ships and their cargoes are decided by the Consular Court of the country to which the ship belongs. After the gold had been landed, operations were commenced to get the vessel off, which proved ineffectual. But most of the cargo was saved, and many parts of the fittings of the ship. According to the practice, the Russian Consul appointed a curator of the wreck, and three persons were appointed by the Russian Consul to decide upon the average to be paid by all parties concerned. They found it not a case of average, but a case of *salvage;* and they awarded that the cargo,

* L. R. 4. Q. B. 414.

including the gold, must contribute to the expenses in certain proportions, according to the value, and this threw by far the greater part of the expenses on the gold. The agents of the plaintiffs and defendants protested against the award, as the gold had been landed before any of the operations had been commenced; but the award was ratified by the Russian Minister at Constantinople, and no notice of appeal to the Court at St. Petersburg having been lodged within eight days, it became a definite judgment, binding on all parties."

"The plaintiffs, having been thus obliged to pay the sum awarded against the gold, brought an action to recover a proportionate part of it from the defendants, as a partial loss by the perils insured against."

"It was holden that it was unnecessary to go into the question of whether or not the judgment of the Russian Consular Court was strictly according to the law administered in that Court; the ship having been wrecked, the consequence was that the gold had got into the hands of the Russian authorities, and, in order to get it back, the plaintiffs had been compelled to pay the sum claimed, and this was the immediate consequence of the wreck, and the plaintiffs were therefore entitled to recover the money as a loss by perils of the sea; and that the plaintiffs had done all that a reasonable uninsured owner would have done, and were not bound to have appealed to the Court at St. Petersburg."

"Secondly, in cases of admitted general average, England, in conformity with the maritime laws and usages of all Nations, holds that the place of the ship's destination, or delivery of her cargo, is the place at which the average is to be adjusted."

"This adjustment must be made conformably to the law of that place."

"When so made, it will be conclusive as to the items, as well as to the apportionment thereof upon the various interests, although it may be different from what the English law would have made, if the adjustment had been settled in an English port." *

XIV.—*Abandonment.*

§ 65. The insured ship and goods can be abandoned or given over to the underwriters in the following cases, viz.:—

a. Shipwreck.
b. Stranding with breaking up.
c. Being rendered useless by sea-damage.
d. Perishing or decay by sea-damage.
e. Bringing-up or detention by a Foreign Power.
f. Stoppage or detention by the enemy or other *force majeure*, after the beginning of the voyage; all without prejudice to the particular provisions contained in the subjoined general rules of the *lex mercatoria*, unless the *lex fori* provides otherwise.

1°. The abandonment of the ship, by reason of its being rendered useless, cannot be made, if, after having struck or stranded, she can be brought off again, repaired, and put in proper state to pursue her voyage to her place of destination, and if the cost of repairs does not exceed a certain part of the value at which she has been estimated on closing the insurance, as stated by the *lex loci contractus* (§ 63, sub-section 15).

* Sir ROBERT PHILLIMORE. Comm. on Int. Law. Vol. IV., p. 637 et seq. *Le port de destination, ou autrement dit, celui où le voyage s'achève, est le port du réglement des avaries.* German decision, 1872; Journal de Droit Internat. Privé, No. III., p. 133.

2°. If ships or goods have been stranded, brought up or detained, the expenses of salvage and reclaiming come to the charge of the underwriters, even when those expenses, added to the loss, exceed the amount insured.

3°. The abandonment, in case of perishing or deterioration, cannot be made, unless the loss or damage amounts to or exceeds the stipulated part of the value insured, as required by the *lex loci contractus* with regard to *constructive total loss*. *Constructive total loss.*

4°. The assured can also abandon to the insurer and subsequently claim payment, without any proof of the loss of the ship being necessary, if, a certain time, as required by the *lex loci contractus*, and in proportion to the length of the voyage, has elapsed since the day of the sailing of the ship or since the day on which the last accounts concerning such ship had been received and no tidings of her whatever have come to hand. In these cases it is sometimes sufficient that the assured declares (under oath) that no accounts of the ship insured, or of the ship in which the insured goods have been laden, have directly or indirectly been received by him; this without prejudice to contrary evidence.

5°. Abandonment can be made in case of bringing up or detention, if the ships or goods, brought up or detained, have not been restored or released within the terms fixed by the *lex loci contractus*, counting from the day on which the assured has received advice thereof and according to the distance of the place where the bringing up or detention has occurred. In case of condemnation of the ship or goods brought up or detained, the abandonment can be made immediately.

6°. When deteriorated goods, or condemned ships have been sold on the voyage, the assured can abandon his rights to the underwriters, if,

notwithstanding his endeavours, the proceeds have not been accounted for to him within the time fixed by the *lex loci contractus*; all to be estimated according to the distance of the place of sale, and from the day on which advice of the sale has been received by the assured.

7°. On his making abandonment, the assured is bound to state all the insurances, which he has effected or ordered to be effected on the property insured and the bottomry or respondentia which, to his knowledge, has been taken on the insured ship or goods; in default thereof, the term of payment, which should begin to run from the day of abandonment, is suspended till the day on which he shall have made that statement, without any prolongation of the time, allowed by law for abandonment, being occasioned thereby. In case of false statements, the assured is deprived of the benefits of the insurance.

8°. On making the abandonment, the assured is likewise bound to acquaint the underwriters with what he has done to promote the saving or release of the object insured, and the persons or correspondents he has employed to that effect.

9°. Abandonment cannot be made partially, nor conditionally. If the full value of ships or goods has not been insured, and the assured has thus run the risk of a part himself, the abandonment does not extend any further than to the amount insured, in proportion to the part uncovered by insurance.

10°. The abandonment having been made conformably to the prescriptions of the law governing the insurance contract, the objects insured belong to the underwriter, from the day on which notice of the abandonment was given, without prejudice to the share of the assured, in the case alluded to in sub-section 9°.

11°. The underwriter cannot exempt himself from the payment of the sum insured, on the pretence that the ship or goods have been released after the abandonment, if an action on the policy for a total loss have begun before the restitution.

12°. If the time of payment has not been determined by the agreements, the underwriter must pay the sum insured, together with the charges of the abandonment, within the term fixed by the *lex loci contractus*, after notice of the abandonment has been given. After that time he also pays legal interests. The abandoned property is responsible for that payment.

Opinion of Arnould with regard to Constructive total loss.

"With regard to loss, it is obvious," says Arnould, "that between possession in safety, of the property insured and its annihilation, for instance by fire, or its entire loss, for example by foundering at sea, the possible variety and modification of loss is indefinite."

"There may be a total loss, for example through capture by the enemy, that shall cease to be a loss, for instance by recapture or by restitution under sentence of a Court of prize. There may be a loss which is not total, but for all practical purposes is nothing else, that is to say, it must, for the purpose of the policy, be construed as a total loss. There is a *constructive total loss* of the ship, when by perils of the sea she is converted into such a wreck that it would cost more money to restore her than she would afterwards sell for. The assured may, under these circumstances, give the underwriters notice that he abandons the wreck to them, and claims for a total loss. But the underwriters are not bound to act upon his construction of existing circumstances and accept the abandonment. He may

unintentionally misconstrue the state of facts, and this may be proved against him in many ways, one of which would be by recovering and restoring the ship to him in such a condition that he is not at liberty in law to refuse it."

"Yet the actually existing circumstances of the vessel, at the time of the notice of abandonment, may have been such as to justify the notice in law. If the assured, notwithstanding the underwriter's refusal to accept the abandonment, begins an action on the policy for a total loss, while the circumstances continue to be such as justify an abandonment, any restitution afterwards of the ship can have no effect so as to take away his right to recover. This depends on the nature of an action, which has regard only to the state of facts between the parties, at the time of writ issued. If, on the contrary, the restitution of the ship took place before action commenced, although after notice of abandonment given, the right of action against the underwriter is gone. This difference is not a mere technical distinction, due to refinements of law by the lawyers. Justice, for the purpose of a determination of the dispute between litigants, must confine its regards to some fixed period of time, during which the state of the facts may be ascertained, as the foundations of judgment or decree. But if, before the assured has gone into Court, there be restitution of his property, he ceases to be in a condition requiring to be indemnified against a total loss, and his notice of abandonment, though once valid, is obliterated to the eye of justice by the state of facts which have subsequently supervened. His constructive claim to indemnity ceases to exist by the effect of subsequent events before he can assert it in law by issuing of the writ. The notice indeed

was necessary, and may at the time have been valid, because the loss existing may have been no more than constructive. But though the loss be, *primâ facie*, total, as in the case of capture, and notice of abandonment have been given, still, for the same reason, if there be restitution before action commenced, occasion for such indemnity no longer exists in respect of the past, and any foundation for asserting the right by legal claim is consequently gone."

"Such is the English law as it proceeds severally upon the right construction of the nature of the contract between the parties, and upon the essential view of a legal assertion of right by commencement of an action. The Legislature might have interfered, as in France, by declaring that a notice of abandonment, once given under circumstances that gave it validity, could not be superseded, except with the consent of both parties, by any subsequent change of circumstances. Or, instead of leaving the parties to determine, in each case, upon the facts arising, whether the loss be or be not so nearly total as for all practical purposes it ought to be so construed, the British Parliament might have enacted, as the law is in the United States, that damage to the extent of 50 per cent. and upwards of the value of the property insured is to be construed a total loss. All that the British Legislature and the English Judicature have done is to prevent either party, to the injury of the other, and consequently of the mercantile community at large, from perverting the contract between them to purposes which are alien to the essential notion of idemnity, on which alone it is wholly based." *

* ARNOULD, Marine Insurance, Edit. Maclachlan, 1877, p. 14.

XV.—*Shipping Laws.*

Sea-going vessels. § 66. With regard to sea-going vessels, the following rules of the *lex mercatoria* are generally applicable.

1°. Although sea-going vessels are movable property, and ought as such to be governed by the rules governing this class of property, yet most Legislatures adopted the rule, that the delivery or transfer of sea-going ships or shares thereof, cannot take place otherwise than by an act or bill of sale recorded in a public register, which is kept, for that purpose, at the place to which the vessel in question belongs. With regard to the national character and jurisdiction of vessels, we refer the reader to the Fifteenth Chapter.

Registration and Transfer of Sea-going vessels. 2°. When ships, however, whilst abroad in a foreign port, are transferred to foreigners, the delivery is made according to the laws and usages of the place where the transaction takes place, but without prejudice to the rights and privileges as contracted by the *lex loci contractus*, to which belong the privileged debts as mentioned hereafter. When transfer takes place in a foreign country, but without changing the nationality, registration may be renewed, if required, as stated in subsection 1°.

3°. In judicial sales of ships, the rules laid down in the Civil Code are complied with, in accordance with the *lex fori*.

Privileged Debts. 4°. The transfer of ownership of sea-going ships, by sale, cannot take place otherwise than subject to the liabilities and without prejudice to

the privileges and rights, as mentioned in sub-sections 5°., 6°. and 7°., of this section.

5°. The privileged debts, which, in the case adverted to above, can be recovered out of the proceeds of sea-going ships, are as follow. They are privileged in the following order, viz.:—

a. Salvage, assistance, and pilot dues.

b. Tonnage dues, beacon and lighthouse and quarantine dues, with other port charges.

c. Wages of guards, keepers, and porters, and other expenses of watching the vessel.

d. Rent of warehouses or stores, where the ship's rigging etc., are deposited.

e. Wages of the master and crew.

f. Cost of sails, cordage, and other requisites, and the expenses incurred in maintaining and repairing the vessel and its appurtenances.

g. Money advanced or lent to the captain or paid for or by him, for the benefit and use of the ship, as also the amount due as indemnity for goods which he had to sell, in order to discharge such debts, and, in case money has been taken upon bottomry, for the whole or part of the same,—the bottomry bond with addition of the premium thereon (§§ 69 & 75).

The debts above mentioned under *a*, *b*, *e*, *f* and *g*, enjoy the privilege of precedence, if contracted on account of the last voyage; namely: those mentioned under *a*, *b* and *g*, as far as they have been contracted during the voyage, and those designated under *e* and *f*, as far as they have been contracted from the time of fitting out

the ship for the voyage, till the time at which the voyage is held to have ended. The voyage is held to have ended, one and twenty days after the ship has arrived at her destination, or as much sooner as the last goods have been unloaded, if not otherwise provided for by the *lex fori*. The debts mentioned under *c* and *d* enjoy the privilege up to the amount they have been incurred, from the day on which the ship entered the port, until the day of its sale.

h. Necessary expenses incurred for repairs to the ship and her equipment, not pertaining to those above mentioned under *f* and *g*, during the last three years, from the day on which the repairs were completed.

i. The claims arising from the building of the vessel, with interest due for the last three years.

j. Bottomry on the hull of the ship, on her standing and running rigging and appurtenances, taken for the victualling and equipping thereof, contracted and signed for before the ship's departure; the bottomry premium not included.

k. The damages, costs, and interest claimed by shippers, for short or improper delivery of goods shipped by them, and those caused by neglect of duty on the part of master or crew.

6°. The debts mentioned in the preceding sub-section under one and the same heading, and contracted in one and the same port, have equal rights and will be taken in their order, but if, in pursuing the voyage, similar debts have been contracted, by necessity, afterwards in other ports, or even in the same port, in case the ship,

after having left it, has been compelled to put back to it once more, then the debts contracted afterwards take precedence of the debts contracted before.

7°. After the debts already mentioned in sub-section 5°., the following are privileged in the case of vessels therein alluded to :—

a. The amount of the purchase-money yet unpaid, with interest for the last two years.

b. The amount of pledge or indenture bonds on the vessel, for ordinary debts, with like interest on the same, whether the ship has come into the possession of the creditor or of a third party or not. The claims mentioned here shall not be privileged unless they be acknowledged by deed expressing the amount of the debt and of the interest agreed upon. The priority of these debts is regulated by the order of their respective dates.

8°. The privileges above mentioned are lost, if the vessel, after having been transferred to another, without protest of privileged creditors, has been navigated, in the name and for account of the new owner, during sixty days, or such other time and term as fixed by the respective laws, after leaving port. Protest of a privileged creditor comes only to the benefit of the creditor in whose name it has been made. For the protection of the rights of absent creditors it is necessary that the rule above mentioned do not apply to the sale in a foreign country (as stated already in sub-section 2°.), in which case the liabilities, privileges and rights, governed by the *lex loci contractus*, remain untouched, if the privileged creditor can prove that, in consequence of the distance, the transfer has taken place without his knowledge (§ 67).

9°. In case of judiciary sales, the law expenses take precedence of all other debts.

10°. In case of bankruptcy or insolvency of the owner of the vessel, all claims and debts existing at the charge of the vessel have preference to those of all other creditors of the estate, but such preference does not extend to the cost of insurance.

11°. The seller of a vessel is bound to make known to the purchaser all the privileged debts, and to give him a list of them, signed by himself.

Owners, Managers and Joint-owners.

§ 67. When two or more persons employ a ship, of which they are joint owners, for their common benefit, this constitutes a community or tenancy in common, the concerns of which are governed by the agreement and by the majority of votes taken in proportion to the number of shares. When not otherwise provided for by the *lex fori*, the following general rules of the *lex mercatoria* may be observed, with regard to the liabilities of owners, part owners and managers.

1°. The smallest share is counted as one vote, and the number of votes, accruing to each part-owner, is in proportion to this smallest share.

2°. The owner of a vessel, or, in case of shares, the part-owners, each in proportion to his shares, are responsible for the acts and engagements of the master, in whatever is relative to the ship and the venture. This responsibility ceases by the abandonment of the ship and of the freight, earned and yet to be earned by it, for the venture to which the acts and engagements relate. Such abandonment is made by a notarial deed. Every part-owner is released from his responsibility by a like abandonment of his share, in the above stated form. If the owner or part-owners have insured their interest in the ship and freight,

their claim on the insurer is not included in this abandonment.

3°. The owner of a ship or each part-owner for his share, is nevertheless personally liable for all repairs and disbursements incurred, in behalf of the ship, by his particular order, or that of the joint owners.

4°. Every part-owner is bound to contribute towards the fitting out of the ship, in proportion to his share, which is liable and accountable for the expenses incurred through the fitting out of the ship.

5°. When a ship is lying in a port of refuge, to be repaired, and the majority of the owners are for repairing it, the minority are bound either to consent thereto, or to give up their shares to the majority, the latter being obliged to accept the same at such price as fixed by an estimate made by competent persons.

6°. If the majority determine to dissolve the joint-ownership, and to sell the ship, the minority are bound thereby. The sale must take place in public, unless the owners should unanimously have decided otherwise. No joint-ownership can however be dissolved, during an undertaken voyage.

The Manager or Ship's husband.

7°. No other than a part-owner can be appointed as manager or ship's husband, unless by unanimous consent of all the owners. The manager can be discharged by a majority of the votes of part-owners.

8°. The managing owner or ship's husband represents the whole society of owners, and can act for the same in judicial cases or otherwise, provided that power has not been limited by the *lex fori* or by express stipulations in the contract of joint ownership, or the so-called owner's certificate.

Claims of a discharged master on the ship's husband.

9°. The managing owner or ship's husband appoints the master and discharges him as he thinks proper. If the master has been discharged for lawful reasons, he has no right to indemnity. In case the dismissal has taken place without lawful reason, before the commencement of the voyage, the master is entitled to daily wages for the time of his service only, but if dismissed during the voyage, full wages and the costs of his voyage home are due to him ; always provided that no other stipulations have been made by written agreement. The same rules bind the owners and joint-owners of the ship.

10°. The dismissed master, who has a share in the ship, has a right to give up his share to the other joint-owners against payment of the value, to be fixed by competent persons.

11°. The managing owner or ship's husband has the entire management of all that is requisite for the keeping in repair, equipment, victualling and the affreightment of the ship.

For every new voyage or affreightment, the managing owner needs the assent of the other part-owners or of the majority of them, unless a more unlimited authority has been given him by the owners' agreement with respect to this point.

He is answerable to the joint-owners for all damages or losses which may befall them by his fault or negligence. They are privileged for the compensation thereof on his share in the ship.

He is not qualified to have the ship insured without the expressed orders of all the owners. But he is bound to insure such costs of repairs which may have occurred during the voyage and to defray which the master has not taken up money on bottomry.

His acts and engagements bind all the part-owners, in proportion to their shares, but these are qualified to give up their share in the ship, and the freight which has been earned and is to be earned by the undertaking to which the acts and engagements are relative, in the manner mentioned in sub-section 2°., without any further liability.

In case the managing owner or ship's husband has any repairs done to the ship, or has performed any act in connection with the vessel, at the special desire of the owners or with their assent, they are liable for the same in proportion to their respective shares.

General terms, contained in the owners' agreement, are not considered as a special charge or assent.

The manager is bound to furnish to every part-owner any information and explanation he may require, about all matters and circumstances concerning the ship, the voyage, and equipment; he must also allow inspection of all books, letters and papers, relative to his management.

He is also bound to lay before the owners, at the requisition of any of them, after the termination of each voyage, a proper account and justification of his management, as well with regard to the state of the ship and the concern generally, as to the performed voyage, accompanied by all the vouchers relative thereto, and to assign and pay to them, without delay, what they have a right to.

12°. Every part-owner is obliged, on the other hand, to assist in examining and closing that account, and to pay his share of what is found to be due to the managing owner.

13°. The approbation of this account by the majority does not exclude the minority from enforcing their rights.

XVI.—*Ship Masters, Officers and Crew.*

The Master.

§ 68. The appointment of the master rests exclusively with the owner or part-owners or, through delegation of power, with the manager or ship's husband (§ 67, 9°.), or in case of extreme necessity, and in a foreign port, with the consignee or agent of the owners, or the national Consul, who may appoint a master, in conformity with the national laws of the respective vessel.

The master is charged with the duty of navigating the vessel, either for the consideration of stipulated wages or of a share in the profits of freight or for both, under the following rights and obligations.

1°. The master appoints the crew and selects the officers and seamen with the concurrence of the owner or manager.

2°. The master may not discharge any officers or seamen, during the voyage, without lawful cause.

3°. He is bound to use all diligence, care and skill, and to indemnify the owner or joint-owner for all costs and damages, with legal interest, incurred by them through his negligence or fault in the exercise of his employment. He is answerable for all damages occurring to the goods to be transported, except such as are caused by defect of the goods themselves, by superior power, or by fault or negligence of the shipper.

4°. He is answerable for all the consequences of bad or improper stowage and placing of the goods in the ship.

5°. Before beginning to load for a foreign port, the master is bound, at the request and cost of any interested party, to have his ship examined by competent sworn surveyors, appointed for the purpose by the competent authority or, if there be none such at the place where the ship is lying, by the respective Consul, in order to ascertain whether the ship is provided with all necessaries, and held fit to undertake the voyage. It is the duty of the master as well as of the owners to see that the vessel is seaworthy. In every contract for the carriage of goods between a person setting himself forth as the owner of a vessel ready to carry goods for hire and the person putting goods on board, or employing his vessel for that purpose, it is a term of the contract on the part of the carrier *implied by law*, that his vessel is tight, staunch and strong, and fit for the purpose or employment for which he offers and holds it forth to the public; the law presumes a promise to that effect on the part of the carrier, without any actual proof. *

6°. The master is accountable for all damage occurring to goods loaded by him on deck, without consent of the shipper.

7°. Without prejudice to the personal responsibility of the master to the shippers, in case of damage to the cargo caused by his negligence or fault, the ship and the freight earned on the voyage are liable to them for the same. The owner or joint-owners of the ship have a right of claim on the master with regard thereto.

Provisional receipt for shipped goods.

8°. The master is bound to sign, or to have signed by his mate, receipts for all goods shipped on board of his vessel, with specification of

* LEONE LEVI. International Commercial Law. Vol. II. Chapt. XXI. Section 10.

quantities, marks, and numbers, to be afterwards exchanged for the bills of lading (§ 73).

9°. The master should not take on board any goods exhibiting visible outward signs of leakage or damage, or goods which are deficient in package, without making mention of such defects in the receipts and bills of lading; in default thereof the goods are considered to have been shipped in an apparently good and well conditioned state.

10°. The master may not load any merchandise for his own account, without paying freight for the same, or without having obtained the consent of the owner or managing owner, or of the freighters if the whole ship has been freighted,—unless he should be authorized thereto, by the conditions on which he has taken service and charge of the vessel and by the stipulations of the charter-party.

11°. The master who navigates a ship on joint profits, may not load any goods therein for his private account, unless it has been specially agreed upon. In case of transgression of this rule, the goods taken on board for the master's private account are forfeited to the other parties concerned in the cargo, without prejudice to his liability to extra charges, damages, and interest, incurred thereby.

12°. When provided with all necessaries, and ready for departure, the master must, without delay, avail himself of the first favourable opportunity to undertake and perform the voyage for which he has engaged himself.

13°. The master may not defer the voyage on account of sickness of any of the officers or crew, but is bound to replace them immediately by others.

14°. If illness of the master precludes his navigating the ship, when it can and ought to depart, he must appoint another master in his stead, or let his mate succeed him, where this can be done without danger for ship and cargo. If the owner or manager be present at the place of departure, the change can only be effected with his consent.

15°. The master must be provided on board with the following documents, viz.:— *Ship's Papers.*

a. The letter of transfer or proof of property of the vessel, or an authenticated copy thereof.
b. The ship's register.
c. The ship's articles.
d. The manifest.
e. The bills of lading and charter-parties.
f. The Code of Commerce or Shipping Act. (See Chapter XV).

16°. The master is bound to keep a log-book or journal, which must contain the following entries, viz.:—

a. The daily state of wind and weather.
b. The daily progress or delay of the vessel.
c. The longitude and latitude in which she is on each day.
d. All disasters which befall the ship and cargo, and the causes thereof.
e. Particulars, as many as possible, regarding what has been lost in consequence of any disaster, or by cutting away.
f. The courses he has steered, and the reasons for deviating from them, either voluntarily or out of necessity.
g. All resolutions taken in ship's council.
h. The discharge of ship's officers or men, and the reasons thereof.

i. The receipts and expenditure concerning the ship and the cargo, and in general everything, relating to ship and cargo, that can lead to accountableness and justification of accounts, or to the making or resisting of any claim.

17°. The log-book or journal shall be kept up day by day, the state of wind and weather permitting, and be dated and signed by the master and mate.

Report to Manager.

18°. During the voyage the master must avail himself of every opportunity offering to inform the manager of what has occurred to him and the ship.

19°. The master is bound to be personally present on board of his ship from the moment he begins the voyage, until he shall have reached a safe road or port.

20°. In whatever danger the ship may be, the master may not leave the ship during the voyage, without having consulted with the chief men of the ship's company. He is bound in such case to make special provision for the preservation of his log-book and other ship's papers, the specie, and, as much as possible, for the most valuable goods belonging to the cargo; on pain of being personally answerable for the same. If the goods saved or remaining on board, owing to some unforeseen event, and without his fault, have been lost or stolen, he is not answerable for them.

Responsibility of the Pilot.

21°. The master is bound to employ the necessary pilots, whenever law, custom, or prudence requires it. If the ship is put under the charge of a pilot, the pilot, while on board, has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel, while

under his charge, he is answerable as strictly as if he was a common carrier, for his default, negligence or unskilfulness, and the owner would also be responsible to the party injured for the act of the pilot, as being the act of his agent.*

22°. If the master, while on the voyage receives information that the flag has become unfree, he must make for the nearest neutral port, and remain there until the impediment has been removed. Thence he can either depart under convoy, or in some other safe manner, or if he receives peremptory orders for his departure, as well from the owner or manager, as from the parties concerned in the cargo. *Master's duty in case the flag be unfree.*

23°. In case of the ship being brought up, seized or detained, the master is bound to reclaim it, together with the cargo, and must avail himself of every suitable opportunity to acquaint the owner or manager, and the shippers or consignees of the goods on board, with the state of his ship and cargo. He is bound meanwhile, provisionally, to make such necessary arrangements for the safety of ship and cargo as do not admit of any delay. *Master's duty in case of seizure of the vessel.*

24°. In the case mentioned in sub-section 23°., the resolution of the majority of the owners is decisive and binds the minority. Should, however, the majority determine not to prosecute the case, the minority remain at liberty to enforce their right for their own account, under reserve of the obligation of the majority, to contribute towards the charges, so far as they should be benefited by a successful result. *In case of Average. Jettison.*

25°. In all occurrences of importance, whether in setting sail, cutting away of anchors or masts, jettison of goods, engaging helpers or lighters,

* KENT'S Commentaries. Vol. III., p. 207. LEONE LEVI. Intern. Comm. Law. Vol. II. Chapt. XXI. Sect. 10.

putting in a port for shelter, running the ship on shore, and all similar events, the master is bound to consult with his owners or their agents, if present, and, in every instance, with his ship's officers and principal shipmates or men. Where opinions disagree, the opinion of the master is followed.

26°. If any articles must be thrown overboard, the master is bound to sacrifice in preference, if attainable, such as can be best dispensed with, and such as are the heaviest and the least valuable, and next the merchandise between decks at his option, after consulting with his officers. The master is bound to put into writing, as soon as opportunity offers, the consultations thus held. This document must contain the reasons for the jettison and a statement of the goods thrown overboard or damaged. It must be signed by those who have been consulted, or they must state their motives for not signing. It must be entered in the ship's journal or log-book.

27°. The master is bound to affirm, by oath, the truth of the statements contained in the said document after it shall have been transcribed in his journal. This must be done as soon as possible on his arrival at the first port the ship reaches, before the authority designated in sub-section 35°. of this paragraph.

In case of blockaded port.

28°. In case of blockade of the ship's port of destination, the master, not having contrary orders, is bound to make for one of the other nearest ports of the same Power which it is allowed to enter. The regulations contained in sub-section 23°., that respecting reclaiming excepted, are applicable to this case.

In case of want of provisions.

29°. If in want of provisions during the voyage, the master may, after consulting the principal

part of the crew, compel those who are still provided therewith, to give up their store for the common good, against payment of the value (§ 74, sub-section 10).

30°. While at the place of residence of the owner or part owners of the ship, or their agents or correspondents, the master may not, without their special consent, have the ship repaired, nor can he buy any sails, cordage or other things for her service, nor can he take up money on the ship, or affreight or let her.

Liability of the Master, when acting without instructions from owners.

31°. The master who has taken up money on the ship, her stores, or provisions, without necessity, sold or pawned merchandise or provisions, or brought into account feigned losses or expenses, is responsible for it to those concerned. He is personally bound to repay the money taken up, or the value of the goods, independently of penal prosecution if grounds for it exist.

32°. Any sale of the ship by the master, without special authority of the owner or joint owners, except in case of innavigability legally proved, is null and void and the master is moreover bound in damages, independent of penal prosecution if grounds exist.

Report from port of shelter.

33°. Previous to his leaving a port of shelter, or entering upon his return voyage to the ship's own country, the master is bound to forward to his owner, manager, or their agents, an account signed by him, containing a statement of the cargo and the price of the goods taken on board for account of the owners, as also of the cost of repairs effected, the sum borrowed by him, and the names and residences of the lenders.

34°. The master is qualified, before proceeding on the voyage mentioned in sub-section 33°., to insure the goods taken on board as cargo, and

also the amount of his disbursements in behalf of the ship, provided he gives due notice thereof to the owners or manager.

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35°. Every master of a ship is bound, within three times four and twenty hours after entering a port, to exhibit his log-book, and to make a report of his voyage, containing the following details, viz. :—

a. The port and time of his departure.
b. The course he has taken.
c. The dangers which he has encountered, the disturbances, which have occurred on board, and all remarkable circumstances of his voyage.

Such exhibition and report must take place, and be made in a foreign port, before his Consul or, in the absence of a Consular officer, before the competent local authority; or, in a national port, before the competent authority.

36°. On making his report, wherever it may be, the master is bound to have the *visa* of the authority, before which it is made, placed on his log-book or journal, which journal he is bound, at all times, to show to parties concerned, and to allow them to take copies or extracts from it.

37°. In all cases where the master is answerable for number, measure or weight, or interested therein, he may require that the goods be counted, measured, or weighed at the unloading (§ 72, sub-section 28).

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38°. In case of ship-wreck, entering a port for safety, or damage, the master is bound to make a deposition thereof, with all his officers and seamen present, within 24 hours at the first place of arrival, before the public authorities indicated above in sub-section 35°.

All depositions or reports drawn up to serve as proof of losses, disasters, damage, or of any claim whatever, must be affirmed by oath of those who made them, before the competent authority, which is qualified to interrogate the master, officers and seamen, and even the passengers as to facts and circumstances. Contrary proof is allowed to all parties concerned.

Master's account.

39°. After the termination of every voyage, the master is bound to furnish the owners or manager with a proper account and justification of his conduct in the command and management of the ship and cargo, and to deliver up to them with the same, against an acknowledgment in writing, all the journals, books, papers and funds in any way relating to the said account.

Settlement of Master's claims.

40°. The owner or manager is bound to examine without delay the account and justification, and finding them in regular order, to pay out to the master such balance as shall thereby appear to be due to him.

41°. In case of disagreement arising about the account, the owner or manager is bound to pay the master his wages provisionally, under bond, and the books, journal and papers shall be deposited at the respective Consulate or competent legal authority, in conformity with the *lex fori*, until the final settlement of the difference by the competent legal authority or by arbitration.

42°. Should the master have made a condition for a share in the profits, he must abide, for the settlement thereof, by the judicial regulations with respect to commercial partnerships, in conformity with the *lex loci contractus*.

43°. The ship, with her rigging and materials, and the freight earned, are preferably liable to the master, for his wages or monthly pay, as also for his indemnification and travelling expenses.

44°. If the master is part-owner or jointly interested in the ship, his shares and the proportion of profits belonging thereto, are preferably liable to the joint-owners for what is due by him to the joint concern.

45°. In case the master is sole proprietor of the ship, he is subject, with regard to shippers or freighters, to all the obligations devolving on the owner as well as on the master. *

§ 69. Extra repairs and other extra wants of the ship, during a voyage in foreign parts, are supplied under the following considerations.

Extra repairs and necessaries during the voyage, supplied on the authority of the Master.

1°. If, during the voyage, it appears necessary to repair the ship, or to provide sails, portions of the engines, cordage or other stores or provisions, or to supply other pressing wants and deficiencies, and the distance from the residence of the owners or managers of the ship or cargo and their agents precludes awaiting their orders, the master may on his own responsibility, have such repairs effected or make such purchases or disbursements, after having the necessity thereof asserted by a declaration signed by the principal members of the crew, and procuring the authorization of his Consul, or, in default of this, of the local authorities. If in want of the necessary funds for the purpose, and unable to procure them against his drafts on the manager or owners of the ship, he may, as authorized above, take up money on bottomry (§ 75) on the ship and her appurtenances, and, if necessary, on the cargo, or, should

* LEONI LEVI. Internat. Commerc. Law. Vol. II. Chapt. XXI. Sect. 10. ARNOULD. Marine Insurance. Vol. I. Part I. Chapt. VII.

this prove wholly or partially impracticable, he may sell goods to the amount wanted (§ 75, 9).

2°. On the ship's safe arrival at the place of destination, the value of the goods thus sold shall be computed at the market price, which goods of the same description and quality are worth at the said place at the time of the ship's arrival. Where such market price is less than that at which the goods have been sold, the profit shall come to the benefit of the owners of the same. Should the ship be unable to reach her place of destination, the price, at which the goods have been sold, shall be taken as a basis of valuation. *

Ship's Officers and Seamen; their rights and duties.

§ 70. The hiring of ship's officers and seamen and their rights and duties are subject to the following rules.

1°. The contract between the master and the ship's officers and seamen, consists, on the part of the officers and seamen, in engaging their services for one or more voyages or by the month, each in his capacity, for a stipulated payment; and, on the part of the master, in an engagement to pay what is due for that service according to the contract or the law.

The Ship's articles.

2°. The conditions of the engagement between the master and the officers and seamen, are proved by the ship's articles. In default of the ship's articles all other lawful evidence is admitted.

3°. The signing of the ship's articles takes place before a shipping-master or other official appointed for the purpose, which in foreign ports is the Consul of the nationality of the vessel, and contains the following data, in conformity with the *lex loci contractus*.

* LEONE LEVI. Intern. Commerc. Law, Vol. II. Chapt. XXI. Sect. 10. ARNOULD. On the Law of Marine Insurance, Vol. I. Part I. Chapt. VII.

a. The names of the ship, of the master and of the officers and seamen.

b. The place where the voyage begins, that of the ship's destination and the port to which she is to return.

c. The pay or wages agreed upon, and whether it is monthly or for the voyage.

d. The advance promised, or received.

e. The obligation of every member of the crew to come on board with his effects at the time fixed by the master, not to be absent from the ship by night either in the national or a foreign country, without the master's leave, and not to take his effects on or from board, without previous examination by the master or mate.

f. The mate's declaration of his having already performed a voyage to the place of destination as officer, or otherwise.

g. The competency of the master to put on shore and dismiss without wages, before leaving port, any member of the crew who has engaged himself in a capacity for which he is unfit, and to assign to such person such position and wages as he shall think proper, if his unfitness is discovered after the ship's departure.

h. Particulars of the victuals or what are termed rations, which, under ordinary circumstances, must be allowed weekly to each man.

i. The obligation to obey, without contradiction, any order of the master and officers, given by each in his proper capacity, and to abstain from drunkenness and fighting.

j. The textual insertion of those sections of the respective shipping laws, which regulate the rights and duties of officers and seamen.

k. The stipulation that whoever deserts and leaves the ship, before being dismissed, forfeits the wages due to him.

l. The obligation of the chief officer to take care of the proper placing and stowing of the goods to be taken on board, under penalty of indemnification.

m. The obligation of the chief officer to remain on board day and night, while any merchandise remains in the ship, and to take care of the closing and locking, especially by night.

n. The obligation of the officers and seamen to behave properly and in an orderly manner during public worship on board.

o. The general obligation to comply, besides, with whatever is further prescribed by the respective shipping laws.

p. Finally, whatever may have been further agreed upon between the parties, provided it be not contrary to law.

4°. A master who has taken his departure with his ship without the ship's articles being made up and signed, where this is required, shall forfeit to the owner or joint-owners the indemnification stipulated by the respective shipping laws, besides the liability of master, officers and members of the crew for the infringement of those laws with regard to ship's articles. *

* LEONE LEVI. Intern. Commerc. Law, Vol. II. Chapt. XXI. Sect. 11.

5°. The reciprocal obligations between the master and the officers and seamen begin the moment after signing the articles.

Ship's discipline. 6°. The articles having been signed, the officers and seamen are bound to repair on board at the master's command, and to put in order and load the ship.

No one may absent himself from on board without leave from the master or his representative.

The master or his representative can, in conformity with the local laws, call in the public force against those who refuse to come on board, who absent themselves from the ship without leave, or refuse to perform to the end the service for which they are engaged. The expenses thereby incurred can be deducted from the delinquent's wages, without prejudice to his liability to damages and interest where assignable. (Comp. § 44).

7°. Besides the wages agreed upon with seafaring men, proper sustenance is due to them during their term of service.

8°. The ship's officers and ship's company are bound to assist the master in all cases of aggression or calamities befalling the ship and cargo.

Liability to damages. 9°. All ship's officers and men, who engage themselves as duly qualified, are answerable on that account for any damages, caused by ignorance in the performance of their duties.

Liabilities of the Chief-Officer. 10°. The chief officer who engages himself for a port whither he has never navigated as officer, without declaring this on signing the articles, or who has falsely asserted his having made a voyage thither in that capacity, forfeits his full wages, the contract being void from the outset. In case of damage occurring to the ship or cargo through his ignorance, he is bound to indemnify the same, independent of punishment by law, if any ground for this may exist in his false statement.

11°. If the master, while in a foreign country, thinks fit to proceed to another port, the chief officer is bound to make again a declaration as mentioned above, before he undertakes the voyage, under the same liability to forfeiture, indemnification and punishment in the case of false statement.

12°. If in this latter case, the chief officer declares never to have made a voyage to that place as officer, he shall nevertheless continue in service for the wages agreed upon, or, if engaged for the voyage, against an augmentation of pay, proportionate to the prolongation and the nature of the voyage. The master is not entitled in such case to dismiss him without paying him, in full, the wages agreed upon for the voyage, and that, if engaged by the month, up to the time at which the voyage would probably have ended. He is bound, moreover, to indemnify him for his travelling expenses to the place where he has been engaged. He is, however, not obliged to make this payment or indemnity, if the chief officer has, on his engagement, falsely declared to the master that he had previously made such voyage as officer.

Rules concerning Wages, Profits and Indemnities.

13°. The ship's officers or seamen may not, without paying freight and without consent of the owners or, if the whole ship is freighted, of the freighters, load any merchandise on their own account, unless it has been otherwise agreed upon at their engagement or by the charter-party.

14°. In case the voyage be entirely given up, on behalf of the owner, the master, or the freighter, it is left at the option of the officers and seamen, either to keep as indemnity what they have received as advance, or to claim a month's wages under deduction of the advance, or if engaged by the voyage, *one fourth* of the pay agreed upon, if

not otherwise regulated by the *lex loci contractus*. In whatever manner they may have been hired, they remain entitled to their pay, as agreed upon, for the number of days during which they have done duty, to count from the day of signing the ship's articles.

15°. If the suspension of the voyage takes place after it had been entered upon, they receive, over and above the pay already earned, as indemnity, double of what is mentioned in sub-section 14°., besides the necessary travelling expenses to the place of the ship's departure; provided however, that the pay earned, added to the indemnity, does, in no instance, exceed what they would have received if the voyage had been completed. In case of disagreement as to the travelling expenses for officers and ship's company, the affair is submitted to the decision of the respective Consul, or, in default of such, to a competent authority at the place where the ship is lying.

16°. If previous to the beginning of the voyage, trade with the place whither the ship is bound, or the exportation of the articles for which it has been especially freighted, be forbidden, or the ship be seized by authority before the commencement of the voyage, wages are only due for the time during which the officers and seamen have been in actual service, under deduction of what they have received as advance.

17°. Such interdiction or seizure taking place after the commencement of the voyage, they retain their full wages until discharged, and receive travelling expenses as mentioned in sub-section 15°.

18°. If the voyage be protracted in behalf of the master or freighter, through stay in a port of shelter, or by unlawful capture or detention, or by other causes, in behalf of and for the safety of

ship and cargo, the pay of the officers and men who have been engaged for the voyage, must be augmented in proportion to such prolongation.

19°. When the officers and seamen serve under an engagement to receive a portion of the profits of the adventure (as in the fishing-trade), or of the freight, no indemnity or hire is due to them on account of breaking off, delaying or prolongation of the voyage caused by a superior power.

If the breaking off, delaying, or prolongation of the voyage is caused by shippers of cargo, the ship's company participate in the indemnity assigned to the ship. Such indemnity is divided between the owners and the ship's company in the same proportion as would have been adopted with regard to the freight. Such is also the case, if the breaking off, delaying or prolongation of the voyage takes place in behalf of the master or owners of the ship, who are then liable to the ship's company for the same proportionate indemnity.

20°. Where the officers and seamen have been engaged for more than one voyage, they have a right, at the end of every voyage, to claim their full pay for the one already completed.

21°. The ship's officers and ship's company cannot claim any wages or pay for the voyage on which the ship is captured or declared lawful prize, or on which she is so stranded and broken that ship and cargo are totally lost. They are not liable, however, to the restitution of what has been paid them in advance.

Freight earned is accountable for wages when proceeds of wreck are insufficient.

22°. When part of the ship has been saved, the officers and ship's company have a right to claim the wages due to them, out of the proceeds of what has been saved of the wreck or remains

of the ship. This being insufficient, or when goods alone have been saved, the freight earned is accountable for such wages.

23°. The officers and ship's company engaged on share in the freight, have a claim on the freight only, in proportion to what the master or charterer receives.

Extra services to be rewarded.

24°. On whatever footing the ship's officers and crew have been hired, they are always paid for the days during which they have been employed in saving the lost ship and goods. Particular diligence, crowned with success, is in that case rewarded extraordinarily in the way of salvage (§ 78).

Extra service is taken note of in the log-book or journal, and can give claim to extraordinary reward.

Sick and wounded in ship's service to be properly cared for.

25°. Every member of the ship's company who becomes ill during the voyage, or is, in the service of the ship, wounded or maimed in battle against an enemy or pirates, continues entitled to his pay, and has a right to care and cure; and if disabled, to indemnification, in as much and in such a shape or manner, as the judge, in case of disagreement, shall deem equitable, in conformity with the *lex loci contractus*.

26°. The expenses incurred for attendance and cure and indemnification come to the charge of the ship and the freight earned, if the illness, wounding, or disabling, have occurred in the ship's service. They are assessed as general average on the ship and her freight and cargo, if they have been occasioned by battle in the ship's defence (§ 63, No. 2, *g*.)

27°. If any sick, wounded, or maimed seaman, be not so far recovered at the ship's departure, that he can be taken on board with safety, the said attendance and treatment shall continue until

his recovery. The master is bound, before his departure, to pay the said expenses and to provide for the maintenance of the sick or wounded seaman.

28°. The sick, wounded or maimed man continues entitled not only to his pay during the cure, but also till the day on which he can be returned to the place from which he started with the ship, and to a reasonable indemnity for his travelling-expenses thither.

29°. In the cases mentioned in sub-sections 26°., 27°. and 28°. he has no further claim than on the ship and the freight earned, or on the ship and the freight earned and on the cargo.

30°. Where a ship's officer or other member of the crew, having left the ship without leave, becomes ill, is wounded or maimed on shore, the expenses of his treatment and cure remain at his own charge.

Effects of deceased Seamen to be taken care of.

31°. The body of one of the ship's company, who has died during the voyage, must be buried at the ship's expense, or put overboard, as the master may decide.

The master is bound to take charge of the effects left on board by the deceased, and to make a proper inventory of the same in the presence of two of the ship's company, which inventory must be signed by him and the said two men.

The pay or wages are due to his heirs under the following distinctions:—

a. If he be engaged by the month, pay or wages are due to the end of the current month.

b. If engaged for the voyage out and home, one half is due if he dies on the outward voyage, and the whole, if he dies on the voyage home.

c. If the deceased was engaged on part of profit or freight, his share is due in full, if he dies after the commencement of the voyage.

d. The pay of men who have died in the defence of the ship, is due for the whole voyage, if the ship reaches a port in safety.

Discharge of Seamen.

32°. If the master discharges officers or men, for lawful reasons, he must pay them their wages earned, calculated in proportion to the voyage performed, up to the day of discharge; but in case the discharge is given before the commencement of the voyage, then only for the days during which they have been in service.

Lawful reasons of discharge.

The following are considered lawful reasons for discharge, viz.:—

a. Disobedience.

b. Habitual drunkenness.

c. Fighting on board.

d. An interruption of the voyage legally allowed or prescribed, provided it be in conformity with what the respective law stipulates in the case.

e. Absence from on board without leave, or desertion.

33°. Any officer or seaman who shows proof of his having been discharged without lawful reason, after having signed the articles, is entitled to indemnity at the master's charge, in conformity with the *lex loci contractus*. The master cannot claim the amount of the indemnity from the owner or joint-owners, unless he has been authorized by them to discharge the man.

ful reasons timing

34°. Officers and crew can decline service only when in port, and the ship being in safety and free from all actual present dangers, and only for the following lawful reasons :—

a. When their time of engagement, as stipulated in the ship's articles, is expired.

b. If the master wishes to alter the voyage for which they have engaged themselves, before it has begun.

c. If, previous to the beginning of the voyage, the respective State becomes involved in a maritime war, or if, during the ship's stay in a port of refuge, a war breaks out in which the State takes part.

d. If before the beginning of the voyage, or while the ship is lying in a port of shelter, certain intelligence is received that the plague, yellow fever, or other contagious disease prevails at the place whither the ship was bound.

e. If, the ship passes entirely into the hands of other owners, before the commencement of the voyage.

f. If, before the beginning of the voyage, the master dies, or be dismissed by the owners or by the managing owner.

g. If it had been agreed to depart under convoy, and no convoy is granted.

If, while in foreign parts, the master thinks proper to proceed to another free port and to unload or reload the ship, the crew must remain in service, even when the voyage is prolonged thereby. In this case, the pay of those engaged for the voyage is increased in proportion. But on discharging them in foreign parts, the master is bound to pay each what is due to him. He can do so by drawing a bill on the owner or managing owner.

eful reasons complaints.

35°. The officers or the crew may not, on any pretence whatsoever, trouble or impede the master or the ship by law-suits of any kind, before the voyage is ended. They can, however, while the ship is lying in a port, claim their discharge from the respective Consul, or, in default thereof, from the competent local authorities, if the master has ill-treated them or withheld from them the stipulated victuals.

Paying-off at the end of the voyage.

36°. At the end of the voyage, the owner or managing owner is bound to deliver the effects, money, and the wages earned, of such of the crew as have died during the voyage, or have been left behind, to their heirs or representatives, and if these cannot be immediately found out, to deal therewith in accordance with the existing regulations on the subject.

Obligations of Officers and Crew after the completion of the voyage or when ship is lost or captured.

37°. After the completion of the voyage for which the crew was engaged, they must, at the master's or owner's desire, unload and stay the ship, bring it to its berth, and moor and unrig it; and, further, within three days after the unloading of the ship, make the required deposition or report upon oath, either alone or with the master (§ 68, sub-sections 35°.–38°.)

As soon as the requirements, mentioned above, have been complied with by the officers and crew, they must be immediately discharged, and the wages earned paid to them, within four and twenty hours. Owners and managing owners are liable to a fine for each day of illegal withholding of payments due to Officers and Crew, after their discharge, as provided for by the *lex fori*.

38°. When a ship is lost or captured, and declared a lawful prize, without any freight being earned or anything saved, those of the crew, who return, are, nevertheless, bound to confirm the depositions of the master, or conscientiously

to report or depose upon oath. A reasonable indemnity per day is due to them for their loss of time, in making such deposition.

39°. Ship and freight are specially liable for the wages, indemnity, and travelling expenses of the crew.

40°. The ship's officers and crew, by acts of neglect or misconduct, committed in the service, bind the ship and freight in favour of the shipper of cargo who sustains damage thereby, saving the ship-owner's claim for redress on the master, and his recourse against the crew for *barratry*.

Barratry, says Leone Levi, is any fraudulent or criminal conduct against the owners of a ship or goods, by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. *Barratry.*

Sailing out of port without paying duties, whereby the ship is subject to forfeiture; cruising for and taking a prize, contrary to the instructions of the owner; resistance to or disregard of an embargo lawfully laid; attempting a breach of blockade; smuggling, wilfully delaying or deviating, running away with the ship, and selling her or part of her cargo,—are all considered barratry by the master. A master would be guilty of a breach of trust to his owners, and therefore of barratry, if he did any thing injurious to their interest, in contravention of the law,—the observance of which is, where nothing is expressed to the contrary, always implied in their order. Barratry may be committed by the owner or master against the general freighter, or with the consent of the freighters against the owners. It may be committed by a master himself, or by a

part-owner against another; but if the master be owner, he cannot commit barratry against himself. *

Barratry makes the persons implicated liable to indemnification of damages, cost and interest, besides the punishment by law, where this is applicable by the *lex fori*. The wages and hire of the master, officers and crew are especially liable for such recovery.

XVII.—*Freighting and Charter-party.*

Freighting and charter-party.

§ 71. As regards freighting and chartering of vessels and contracts of affreightment, the following general rules may be found useful.

1°. There are two forms of the contract of affreightment, viz.:—

a. By a charter-party for the whole or part of a ship, and for the performing of one or more voyages.

b. For the loading *by piecemeal* or a general cargo, where the master of a ship contracts, with any party offering, to load and convey the quantity of goods he thinks proper. This contract for conveyance in a general ship can be made, either by the owner himself, or by the person by whom the whole vessel is hired under a charter-party.

2°. When a ship is wholly or partly freighted for a sea-voyage, the contract of affreightment is called a *charter-party*. Such contract is generally in writing, but it is immaterial whether it be by deed or by writing under hand only. Universally, however, the agreement is not under notary-seal, when it is called a memorandum of charter. Even an agreement between the owners and the merchants, for the employment of a ship on a

* LEONI LEVI. Intern. Comm. Law. Vol. II. Chapt. XXI. Sect. 12.

voyage, not in writing, but acted upon by the parties, is equivalent to a charter-party.

3°. The contract of affreightment, in its usual form, contains the following specifications, viz.:—

a. The name and burthen of the vessel.
b. The name of the master.
c. The names of owner and freighter.
d. The place and time fixed for loading and unloading.
e. The freight agreed upon.
f. The stipulation that the affreightment is for the whole, or for a part of the ship; for the voyage or for a period of time.
g. The lay or running days.
h. The time appointed for the payment of freight and the manner of such payment.
i. The rate of demurrage *per diem*, in case of the vessel's detention beyond her lay or running days.

When the whole of a ship is freighted, the cabin is not included therein. The master is, however, not allowed to load any merchandise in the cabin for himself or others, without the freighter's leave, on pain of costs, damages and interest.

Lay-days and demurrage.

4°. Where no time is limited by the charter-party from which the demurrage is to be reckoned, it is generally reckoned from the time of the ship's arrival at the ordinary place of discharge, according to the usage of the port. According to this usage, the question is also decided, in cases not provided for in the charter-party, if Sundays are to be computed in the calculation of the lay-days, or whether the lay-days mean only working days.

When one part of the cargo is to be shippe or discharged in one place and another part another place, the time allowed for lay-days suspended, during the voyage or removal of

vessel from the one place to the other. This holds good also in case the vessel should, for the purposes of navigation, discharge some of her cargo in lighters, as the lay-days are to be calculated from the period of the vessel's arrival at the selected or usual place of discharge.

After the voyage has begun, the time allowed for lay-days and all that regards the liability for demurrage, questions of release from that liability and the modes of suing for demurrage are to be determined by the law or custom of the respective place, *i. e.* the *lex loci executionis* or the *lex fori*, in all cases not fixed by the charter-party.

5°. The voyage is considered to have begun as soon as the ship has left the place where she commenced loading, or, if going in ballast, when the ballast has been taken in; with observance, however, of the stipulations mentioned in sub-section 4°.

Capacity of the ships. Time and mode of chartering and payment.

6°. The owner or master who has stated the measurement or capacity of the ship to be greater than it really is, is obliged to bear a proportionate reduction of the freight, and to indemnify the freighter for costs, damages and interests. Where the statement does not exceed the actual capacity of the ship by more than *one fortieth* part, the difference is not taken into consideration.

7°. If the time and mode of payment of the freight are not fixed by the charter-party, payment can be claimed immediately upon delivery of the goods loaded.

8°. Ships may be chartered by the voyage, or by the month, or in such other manner as parties may agree upon.

If a ship is chartered by the month, and no agreement to the contrary is made, the contract begins with the day of departure or the beginning of the voyage, (as stated in sub-section 5°.), and

the time of computation continues for the whole course of the voyage and during all unavoidable delays. *

Rights and Obligations of parties to the Contract of affreightment.

§ 72. The principal legal rights and obligations of parties to the contract of affreightment are the following.

1°. When the freighter has not made any use of the time, allowed him by the respective *lex mercatoria* or by the charter-party, for loading, the owner is entitled, at his option, either to the indemnity fixed by the charter-party for the time which he waits, beyond the period allowed, (or, —if not fixed,—to claim such indemnity on an estimate by experts) or, to hold the contract of affreightment and charter-party to be broken, and claim from the freighter one half of the freight agreed upon; or, within the time fixed by law, after having given due notice, to undertake, without cargo, the voyage for which the ship has been chartered, and, after the performing thereof, claim from the freighter, the full freight due, and demurrage, if any has taken place.

2°. If the freighter has only employed part of the time allowed for loading, the owner has the choice, to claim the indemnities mentioned above, or to perform the voyage partly loaded in the manner indicated.

3°. When the ship, having undertaken the voyage partly laden or without any cargo, meets with any casualty on the voyage, whereby expenses are incurred, which, on a full laden ship, would have to be borne as general average, the owner is entitled to claim from the freighter two thirds of the amount of such expenses on what has not been laden.

* LEONI LEVI. Intern. Comm. Law, Vol. II. Chapt. XXII. page 759.

4°. The owner is entitled to one half of the freight fixed by the charter-party, if the freighter gives up the voyage before the expiration of the lay-days allowed, without having laden any cargo on board.

5°. In cases which give the owner the right to perform the voyage partly loaded or without cargo (mentioned in sub-section 1°), he is at liberty, without the freighter's consent, to let the master load merchandise from other parties, as security for the freight and average. The freighter becomes then entitled to the benefit of the freight of such goods, besides being released from the liability of average in proportion as such comes on the goods.

6°. When the freighter ships more goods than was stipulated by the charter-party, the owner is entitled to the freight of what has been shipped in excess, in proportion to the rate fixed by the contract of affreightment.

7°. The owner, not having the ship ready at the time fixed by the contract, or not delivering her actually ready to load, is liable, on behalf of the freighter, for indemnification of costs, damages and interest.

8°. The freighter is bound to deliver to the owner or master all papers and documents required by the law for the conveyance of merchandise, within twice four-and-twenty hours after loading, if this has not been otherwise agreed upon. In default thereof the freighter is liable for indemnification of costs, damages and interest, and the owner or master can, according to the circumstances, moreover be authorized by judicial authority, to unload those goods.

9°. When a ship is laying on for a general cargo, the owner or master is at liberty to determine how long he shall wait for cargo. That time having expired, the master is bound to

avail himself of the first fair wind, tide and opportunity to depart, unless he should be able to agree with the shippers about a further delay.

10°. When a ship is laying on for a general cargo without a time being fixed for loading, every shipper is at liberty to unload his goods again, without payment of the freight, but on restitution to the master of the bills of lading, signed by him, and on sufficient guarantee for all claims if one or more of them should have been despatched; besides the payment of the charges incurred or to be incurred by the loading and unloading. If, however, the ship has already taken more than one half of her cargo on board, the captain is bound to avail himself of the first favourable wind, tide and opportunity to depart, eight days after being summoned thereto, if the majority of the shippers desire it, in which latter case no shipper has a right to take back his goods (§ 73, 5).

11°. When a ship is detained either at her departure, or during the voyage, or at the place of discharge, by the fault or neglect of the freighter or one of the shippers of the cargo, the freighter or such shipper is bound to indemnify the owner or master and the other shippers for costs, damages and interest occasioned thereby; for which indemnity the merchandise shipped by him is liable.

12°. The owner or master is bound to indemnify the freighter or shippers of cargo for all costs, damages and interest, if the ship is seized or detained at her departure, during the voyage, or at the place of discharge, through his fault or neglect.

13°. If the owner sustains any loss in this respect by the fault or neglect of the master, he recovers it from the same.

14°. A freighter or shipper, who, without the master's knowledge or consent, loads goods, the import or export of which is prohibited, or otherwise, without the master's knowledge or concurrence, proceeds, in an illicit manner, in loading or discharging, is bound to indemnify the ship, the master and all further parties concerned for the consequences thereof, and to pay the full stipulated freight and general average, even when the goods are confiscated.

15°. When, during the voyage, the master is compelled to have the ship repaired, the freighter or shipper must await the completion of the repairs, or, if he prefers it, unload the cargo and take charge thereof, against payment of the full freight and the general average due, and subject to the stipulations with regard to the bills of lading, as stated in paragraph 73, sub-section 5°. No freight is due by him during the repairs, if the ship is chartered by the month, nor any augmentation of freight, if she has been freighted by the voyage. If the ship cannot be repaired, the master is bound to hire one or more vessels for his account, to convey the cargo to the place of destination, without being entitled to any augmentation of freight. In this case, the care of transporting the cargo further devolves on the shippers respectively, without prejudice to the obligation of the master, not only to acquaint them with the state of things, but also to take, in the meantime, due precautionary measures for the preservation of the cargo; all unless otherwise agreed upon by the parties (§ 74, 6).

16°. The freighter is not chargeable with any freight, and has a right to indemnification, if it appears that the ship, at the time of undertaking the voyage, was not in a proper state to perform it. Evidence thereof is admitted, notwithstand-

ing the certificates of survey, effected before the departure (§ 68, 5).

17°. If the master has been under the necessity of selling goods, as stated in paragraph 69, subsection 1°., the freight for these goods is due in full, if the ship arrives safely, or if she be lost, in proportion to the part of the voyage performed.

18°. Freight is also due for the goods which, for the general safety, have been jettisoned, and which are indemnified by the general average in conformity with the *lex loci executionis* or the *lex fori*.

19°. No freight is due for goods lost by shipwreck, stranding or through other inevitable causes, or when the vessel is taken by pirates or enemies. The freighter can even claim the restitution of what has been paid in advance, if no agreement to the contrary has been made.

20°. Ship and cargo being ransomed or redeemed, or goods saved after shipwreck, the freight thereof is due,—for as much as the voyage cannot be completed,—up to the place where the ship has been taken, or where she has been wrecked, in proportion to the freight agreed upon. If the ransomed or redeemed goods are delivered by the master at the place of destination, the owner or master is entitled to the full freight. In the cases provided for above, the owner or master contributes to the costs of ransom or salvage by way of general average.

21°. No freight is due for goods which, having belonged to the cargo of a ship, are fished up or rescued at sea or on the coast, without the master's action and afterwards delivered to the parties concerned.

22°. The owner or master has the right to compel the freighter or consignee of the cargo to discharge, against payment of the freight and

average due to him, when the time stipulated by the charter-party or by the law for unloading has expired.

23°. If the lay-days have expired, or if a difference about the unloading arises, the owner or master is justified, after having obtained judicial authority, to discharge the cargo, and to place it under the care of a third person appointed for the purpose, without prejudice to his claims on the same.

24°. The owner or master may not retain the goods on board for the freight, charges and general average. He has the right to require their being warehoused and placed under the care of a third person, until payment of the freight, charges and general average, and, in the case of perishable goods, he may require their being sold. If the general average cannot speedily be estimated, he is entitled to require the deposit in Court of an equitable sum, to be fixed by the Court for the same.

25°. If the master has delivered the goods without having received payment of freight, average and other charges, or without availing himself of the means of security, allowed by the laws of the place of discharge (the *lex fori*), he looses his claim on the freighter or shipper, in case the latter shows that he has settled the amount thereof with the receiver of the goods, or would be unable to obtain its restitution in consequence of his failure.

26°. If the consignee refuses to receive the goods, the owner or master is qualified, on being judicially authorized, to sell part, or if necessary, the whole of the goods, to the amount of the freight, charges and average, provided he deposits the remainder in Court, and without prejudice

to his claim on the freighter or shipper for any deficiency.

27°. Owners or masters have a prior claim on the goods shipped in their vessel, before all other creditors, for freight, charges and average, during *twenty days* after the delivery (or otherwise as stipulated by the *lex fori*) if they have not passed into the hands of a third person.

28°. In all cases where the freight has been stipulated by number, weight or measure, the owner or master has the right to require the counting, weighing or measuring immediately on the discharge (§ 68, sub-section 37°.)

29°. If, in the case mentioned above in sub-section 28°., the goods are delivered from on board without counting, weighing or measuring, the receiver of the same is entitled to prove the identity, number, measure or weight of the goods, even by testimony of the persons whom he has employed to receive and store them.

30°. If damage, deterioration, robbery or diminution of the goods is suspected, the master, consignees or parties concerned, are, respectively, entitled to require a legal investigation, survey and valuation of the loss, before, or at the discharge. Such requisition, though being made by the master, does not prejudice his means of vindication.

31°. If the goods have been delivered from on board by the master, against a receipt or acquitted bill of lading, on which mention is made of their having been landed in a damaged, deteriorated, depreciated or diminished state, the consignee is entitled to procure evidence of their condition by a legal inspection, provided this be asked within twice four-and-twenty hours after the delivery, or within such other period of time as may be stipulated by the *lex fori*.

32°. If the damage or diminution is not visible outwardly, the legal inspection can take place, with legal effect, after the goods have been brought under the management of the receiver or consignee, provided this inspection be made, likewise, within twice four-and-twenty hours after the discharge, or within such other period of time as stipulated by the *lex fori*, and that the identity of the goods can be satisfactorily shown, as stated above in sub-section 29°., or by any other legal evidence, in conformity with the *lex fori*.

33°. The contract of affreightment having been fulfilled by owner and master on their part, the freighter cannot subsequently claim any reduction of freight.

34°. The shipper cannot under any circumstances abandon the goods for the freight. Casks, which have been filled with liquids, and which have leaked during the voyage, so as to be entirely or nearly empty, can, however, be abandoned for freight, average and charges.

Laws which govern the Contract of affreightment.

35°. A vessel being chartered in a foreign country, master as well as ship are subject to the *lex loci contractus*, or, in cases of self-jurisdicton, to the *law of the flag of the vessel* (Comp. § 47). With regard to the discharge and in every thing which must be done in a foreign place, the master and vessel are subject to the *lex loci executionis* and the *lex fori* or to the law of the flag, in cases as mentioned above. *

Dissolution of Contracts of affreightment.

36°. The contract of affreightment is legally dissolved, without the parties having any claim on each other for freight or indemnity, if any of the

* In several cases, contracts of affreightment, if not otherwise stipulated between parties, were held to be permanently governed by the *law of the flag of the vessel*. See judgment of the Exchequer-Chamber delivered by Willes, J. in the case *Lloyd* v. *Guibert*. L. R. I. Q. B. 115; cited by J. A. FOOTE. Private Intern. Jurisprudence, 1878, pp. 315–326.

following circumstances occur *before the beginning of the voyage:*—

a. That the departure of the ship is prevented by inevitable causes,—whether she be chartered for the exportation of cargo from the place of affreightment or chartered when lying in a foreign port.

b. That a prohibition of export from the place of departure, or a prohibition of import at the place of destination, exist, either against all or against some of the articles mentioned in one and the same charter-party; if the prohibition affects only a part of the cargo, the shipper shall be at liberty to maintain the agreement, provided he indemnifies the owner.

c. That trade with the country whither the ship is bound, is prohibited. In all these cases the charges of loading and unloading are for account of the freighter.

37°. The contract of affreightment can be annulled, at the requisition of one of the parties, when a war breaks out before the beginning of the voyage, in consequence of which ship and cargo, or either of them, can no more be considered as neutral property. Ship and cargo being both equally unfree, owner and freighter cannot claim any indemnity from each other. The charges incurred by loading and unloading are, however, for account of the freighter. If the cargo alone is unfree, the freighter pays to the owner all necessary disbursements for the fitting out of the ship for the voyage, together with the wages and board of the crew, paid by him up to the day on which the rescinding of the contract was required, or the goods already shipped were unloaded. I the ship alone is unfree, the owner or master pa all the charges of loading and unloading.

38°. In the cases mentioned in sub-sections 36°. and 37°., owner or master retains his claim for demurrage, if any has been incurred; likewise for general average for damages sustained previous to the dissolution or rescinding of the agreement.

39°. When a ship, chartered for more than one destination, after performing one voyage, is staying in a port from which another voyage should begin, and a war breaks out before this latter has been entered upon, the following rules may be complied with, if not otherwise stipulated by the *lex loci contractus*. (Sub-section 35).

a. Ship and cargo being both unfree, the ship must remain there until peace be restored, or until she can safely depart under convoy or otherwise, or until the master shall have received the necessary orders from the owners of the ship and cargo, and no longer. If the ship be loaded, the master may have the cargo deposited in warehouses or other safe stores, until the voyage can be pursued or other arrangements be made. The board and wages of the crew, the rent of the warehouses, and other expenses, caused by the detention, are borne by the freighter and owner by way of general average. If the ship be not yet laden, two thirds of those charges come to the account of the freighters.

b. The ship alone being unfree, the contract for the voyage not yet performed is annulled at the requisition of the owner. If the ship is loaded, the owner or master pays the charges incurred by loading and unloading, and is only entitled to the freight for the voyage

already performed, demurrage, and general average.

c. *The vessel being free while the cargo alone is unfree*, and the freighter declining to load the ship, the master is at liberty to depart without cargo and to perform the voyage for which the ship is chartered; after the completion of the voyage, the full stipulated freight shall be paid to him. With regard to damages and charges, for the taking in of a new cargo, and the profit arising from the freight thereof, the rules mentioned in sub-sections 3 and 5 of this paragraph are here also applicable.

40°. If a vessel, having been chartered to proceed in ballast to another port to be loaded there for a voyage, is, after arrival at the place of loading, prevented by war from pursuing the voyage, the contract is considered as annulled, if both ship and cargo are unfree, without the parties having any claim on each other. But if the cargo alone is unfree, the parties are released from each other by the payment of one half of the stipulated freight.

41°. If trade with the country whither the ship was proceeding is prohibited, and she is thereby compelled to return with the cargo, no more is due than the freight for the outward voyage, although the ship had been chartered for the voyage out and home.

42°. When the voyage of a ship, either before its beginning, or in the course thereof, is temporarily interrupted by embargo, or by some other measure or means, through *force majeure*, without the fault of the master, owner or freighter, the agreements remain in force, without any damages being due on either side. No freight is due by

the freighter during the detention caused thereby to the ship, if she has been chartered by the month, nor any augmentation of freight, if chartered for the voyage. During this impediment the shipper may discharge his goods at his own expense, provided he reloads them again afterwards, or indemnifies the owner with respect to the freight.

43°. The rules noted above, in sub-sections 36°.–42°., are equally applicable to charters for a general cargo or a so-called general ship (§ 71, sub-section 1°.)

These rules, belonging to the *lex mercatoria*, are applicable in cases not otherwise regulated by the *lex loci contractus*. (Comp. note on Subsection 35).

Nature and legal aspects of the bill of lading.

§ 73. "A Bill of Lading is a formal receipt, subscribed by the master of a ship in his capacity as carrier, acknowledging that he has received the goods specified in it on board his ship and binding himself (under certain exceptions) to deliver them, in the like good order as received, at the place and to the individual named in the bill, or his assigns, on his or their paying him the stipulated freight. The exceptions to the liability of the carrier introduced in the bill of lading are: 'the acts of God, the Nation's enemies, fire and all and every other danger and accident of the seas, rivers, and navigation, of whatever nature and kind soever.' But the application of the exception, inserted in the bill of lading, belongs to the judge who is guided by the usage and practice among merchants. And in order that the loss may fall within that clause, it must have happened from natural causes and not from any neglect or negligence of man. No master or owner is liable for any loss of gold, silver, di-

monds, watches, jewels or precious stones shipped on board a ship, by reason of robbery, embezzlement, making away with or secreting thereof, unless the owner or master has inserted in the bill of lading the true nature, quality and value of the same." *

A bill of lading, signed by the ship-owner or master, is nothing more than a formal receipt, by which the carrier acknowledges that he has received certain goods on board his ship, and binds himself to deliver them to the consignee or his assignee. Nor is it conclusive as between the consignor and the owner. Where the consignor delivers the goods to a carrier by order of the consignee, and they are afterwards lost, the consignor could not maintain an action against the carrier for loss, in his own name, but the action must be brought by the consignee. So as regards vendor and vendee. If the goods remain, whilst the carrier has charge over them, at the risk of the vendor, then it is the vendor who has the action against the carrier. So, when an agreement exists between the consignor and consignee to the effect that the property in the goods shall not vest until bills are accepted, and the bills of lading are till then endorsed to another, the master would have to keep the goods to the shipper's order.

There is nothing final or irrevocable in the nature of a bill of lading; the owner of the goods may change his purpose, at any time before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery of them to some other person. Where the bill of lading is made up for delivery to *the order of the shipper*, or to —— or order or *assigns*,

* 26 *Geo.* 3, *C.* 86, *S.* 2. LEONE LEVI. Intern. Comm. Law. Chapt. XXII. Section 3.

it is the master's duty to retain the goods, and he cannot safely deliver them until they are claimed by the holder of a bill of lading, indorsed by the shipper, to whose order he has engaged to return them. But when, by the terms of agreement, all the conditions attached to the delivery of the goods are performed, the property vests in the consignee, and an action for loss or injury of the goods may be maintained by him. Where a bill of lading is made to the order of the *shipper*, or to —— or *order*, and the same is indorsed, and sent to him as consignee, *as a security for advances*, the property will vest in the consignee, and he may maintain an action for loss or injury. The indorsement of a bill of lading, without consideration, does not transfer any property in the goods, and such consignee cannot maintain an action for delivery of or for loss or injury in the goods.

A bill of lading is transferable by indorsement, and every consignee of goods named in the instrument, and every indorsee of the same, to whom the property of the goods therein mentioned shall pass, by reason of such consignment or indorsement, shall have tranferred to and vested in him all rights of suit, and be subject to the same liabilities, in respect of such goods, as if the contract contained in the bill of lading had been made with himself.* Yet an indorsee, who had indorsed the bill of lading before the arrival of the vessel and before the delivery of the cargo, will not remain liable for the freight. Nor will the rights thus conferred on the consignee of the goods, or indorsee of the bill of lading, affect the right of stoppage in transitu (§ 60), or the right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, arising from his being the consignee or

* 18 and 19. Vict. Chapt. 111. Sec. 1.

indorsee, in consequence of such consignment or indorsement. * Every bill of lading, in the hands of a consignee or indorsee, for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive evidence of such shipment, as against the master or other person signing the same; notwithstanding that such goods, or some part thereof, may not have been so shipped; unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board. The master, or other person who signed the bill may, however, exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person through whom the holder claims. †

Rules with regard to bills of lading.

To bills of lading are further applicable the following rules of the *lex mercatoria*, if not otherwise regulated by the *lex loci contractus*, viz.:—

1°. The bill of lading contains:—

a. The name of the freighter, or shipper.

b. The designation of the consignee, that is the person to whom the goods are sent.

c. The name and domicile of the master, as carrier.

d. The name and sort of the ship, and the place to which she belongs.

e. The kind, quantity, marks and numbers of the goods to be transported.

f. The place of departure, and that of the destination.

g. The stipulations respecting the freight.

* 18 and 19. Vict. Chapt. 111, Sec. 2.

† 18 and 19. Vict. Chapt. 111, Sec. 3. LEONI LEVI. Intern. Comm. Law. Chapt. XXII. Sec. 3.

h. The signature of the master and that of the shipper or of him who manages the shipment for him.

2°. The bill of lading may be to order, to bearer, or to a particular person. That made out to order can be transferred by endorsement.

3°. Of every bill of lading a certain number of original copies are made. One for the freighter or shipper, one for the consignee of the goods, one for the master and one for the owner or joint-owners, or their agent, are the usual number. These original bills of lading must be signed, within four-and-twenty hours after the shipment, and delivered against restitution of the receipts provisionally given for the goods received on board; and it is the duty of the master not to deliver the bill of lading except to the persons who can produce the receipts in exchange for it.

4°. The master is bound, nevertheless, to furnish the freighter or shipper with as many bills of lading, of the same tenor and date, as he may desire. The number of copies is attested on each copy of correspondig tenor and date, with the clause of *one being accomplished, the others to stand void*.

5°. The freighters or shippers cannot discharge the goods shipped, without restoring *all* the bills of lading delivered to them for the same by the master. When one or more of the bills of lading have been despatched, the discharge can only take place on judicial authority, after investigation of circumstances, and under the shipper's security for all claims that may arise with regard to the bills of lading despatched; at all events against payment of the full freight of the goods shipped by him, and the charges of discharging and of restowing the remainder of the cargo; all

without prejudice to what has been stipulated in paragraph 72, sub-section 10.

6°. The bill of lading, made out in due form, serves as evidence between all parties concerned in the shipment, and between those interested in the cargo and the underwriters, under reserve to these latter of the right to produce contrary evidence.

7°. When the goods have been shipped without being counted, weighed or measured, the master may note on the bill of lading that the kind, number, weight or measure are unknown to him.

8°. If the master can prove that the quantity of goods mentioned in the bill of lading cannot have been loaded in the ship, that proof holds good against the shipper, but he is bound, nevertheless, to indemnify the consignee, if this latter has paid or advanced more to the shipper on the faith of the bill of lading than the ship had on board; without prejudice to the recourse of the master on the shipper.

9°. Where a difference exists between bills of lading of one and the same cargo, the most regular one has the preference.

10°. Where several persons are holders of a bill of lading of the same goods, he that holds one made out in his name direct, is entitled to the provisional warehousing, in preference to him, who is only in possession of one made out to order, or to bearer.

11°. If all the bills of lading of the same goods are made out respectively in the names of their several holders, or all to order or to bearer, judicial authority must decide which of them is entitled to store the goods provisionally.

12°. If the master is aware of there being more than one holder of a bill of lading of the same goods, or of an attachment having been laid thereon, he may not discharge the same without authorization of the respective Consul or judicial authority. He may, in such cases, ask for judicial authorization to land the goods, and store them, without prejudice to any one's rights, under such custody as the judge shall appoint.

13°. All parties concerned, and also the person appointed to keep the goods provisionally under his care, may, on account of the state in which they are, or of their being perishable, require their being sold by judicial authority. The proceeds, after deduction of the charges, then represent the goods, and must be placed under judicial deposit.

14°. No attachment or opposition of third parties, not being holders of bills of lading, can prevent the holder of a bill of lading to require the storing and sale by judicial authority, without prejudice to the rights of him by whom the attachment has been laid, or of him that has come in opposition, on the proceeds of the sale.

XVIII.—*Passengers.*

Rules regarding passengers and passage-money.

§ 74. With regard to passengers on sea-voyages to foreign parts the following rules may be applicable, in cases of Concurrent Jurisdiction, viz.:—

1°. If no previous agreement has been made about the fare for the transport of a passenger, the passage-money shall be judicially fixed, if necessary, after hearing competent evidence.

2°. If the passenger does not repair on board, or absents himself from the ship without the master's leave, when she is ready to sail, the

master is at liberty to depart, and nevertheless to claim the full passage-money.

3°. The passenger may not, without the master's consent, transfer to a third person his right resulting from the agreement made.

4°. If the passenger dies before the commencement of the voyage, only one half of the passage-money is due. Where maintenance is included in the passage-money, the amount due is in that case fixed by the judge, if necessary after hearing competent evidence.

5°. If, either before the departure of the ship, or in the course of the voyage, the ship's voyage is broken off, or interrupted by inevitable causes, or by some cause over which the master or owners have no control, the passenger and master are released from each other without any indemnity. If a voyage already begun is put a stop to, the passengers are liable to the payment of the passage-money in proportion to the part of of the voyage performed.

6°. If, in the case mentioned in section 72, sub-section 15, the passenger chooses to await the termination of the repairs, he is not liable to any augmentation of passage-money, but must, during the interval, provide for his own maintenance, or arrange it with the master.

7°. In case the agreement is broken, either before the commencement of the voyage or during its course, the master has a right to claim what he has already furnished to the passengers, or disbursed for them.

8°. The passengers are bound to behave in conformity with the master's directions, for as much as such tend to maintain good order on board.

9°. The master is not obliged, nor even authorized, to touch or stop at any port at the desire or in behalf of passengers.

10. Each passenger provides for his own necessities, unless the contrary has been agreed upon. In case, however, of his being in want of provisions, the master is bound to supply him with necessary victuals, at a reasonable price. The rule mentioned in paragraph 68, sub-section 29, applies also to the passengers.

11°. In the case of a passenger dying during the voyage, it is left to the master's decision to have the body buried, or to consign it to the deep. The master takes charge of the effects left on board by the deceased passenger.

12°. The passenger is considered as shipper with respect to the goods he has on board. But with regard to goods which a passenger has held under his own care, the master is only answerable for damage, when such damage is caused by the master's fault or by that of the crew.

The master has a right of retention and preference on the goods which the passenger has taken on board, for the recovery of passage-money and maintenance.

XIX.—*Bottomry.*

Nature and legal aspects of the bottomry contract.

§ 75. Bottomry is an agreement between a money-lender and a money-borrower, in virtue of which a sum of money is advanced in consideration of a premium and on the security of a ship or goods or of both, to the effect that the lender loses his right to the money advanced and to the premium,—called marine or maritime interest,—if the property pledged, wholly or partly, perishes, or is diminished by casualties at sea, in so far as the claim cannot be covered by what remains of the pledge, whilst the loan and marine interest must be paid in full, if the property pledged arrives safely at the place of destination.

The vital principle of bottomry hypothecation and bonds demands compliance with the following conditions, viz., 1°., that the loan be made under pressure of strict *necessity*, *i.e.* to enable the ship to refit, or to pay for the repairs and despatch of the vessel, for the completion of her voyage; 2°., that the master was unable to obtain such advances upon personal credit; 3°., that the owner is known to have no credit, or no resources for obtaining the necessary supplies. If the master takes up money from a person who knows that he has a general credit in the place, or, at least, that there is an authorized consignee or agent willing to supply his wants, the giving a bottomry bond is a void transaction not affecting the property of the owners.

When the contract of the loan has for its object the hypothecation of the goods, and the loan of money is contracted solely upon merchandise, laden on board a ship,—the repayment of the loan being made to depend upon the safe arrival of the merchandise at the port of destination,—the bottomry is called *respondentia* (§ 62, subsections 16 and 18). *

Rules with regard to bottomry and respondentia.

Bottomry and respondentia are subject to the following rules of the *lex mercatoria*,—if not otherwise stipulated by the *lex loci contractus*.

1°. The agreement must be made in writing. It contains:—

a. The name of the money-lender and of the money-borrower.

b. The sum advanced and the premium or marine interest, agreed to be paid for the sea-risk.

c. The objects specially bound by the loan.

d. The names of the ship and master.

* LEONI LEVI. Intern. Comm. Law, Chapt. XXII. Section 4.

e. Whether the loan takes place for one or more voyages, for what voyage and for what time.

f. The time and terms of re-imbursement of the money raised.

g. The place and date on which the bottomry or respondentia is contracted.

Bottomry Contracts are governed by the lex loci contractus and by the law of the flag.

2°. If the formalities of the *lex loci contractus* have not been complied with, the contract is not considered bottomry, and the money-lender is only entitled to the sum advanced with the legal interest, under personal liability of him who raised the money. The *necessity* of the master's act must be proved by the *law of the flag.* *

3°. All bottomry-bonds can, if made out to order, be transferred to third parties by endorsement, in the same manner as bills of exchange. In this case the endorsee replaces the endorser, as well with regard to profit as to loss, without the endorser being liable to any other guarantee than that of the reality of the bottomry.

4°. Loans on bottomry can be made on pledge: of the hull and keel of the ship; of the tackle and further rigging; of the implements of war and provisions; of the cargo; of any of these objects together or of each separately; of a defined part of any of them; of the freight and expected profit, but under observance of the rules mentioned in sub-section 8°.

5°. If bottomry has been contracted on pledge of the ship, without further definition, the tackle and further rigging, as also the implements of war are included.

6°. Every loan on bottomry contracted for a sum exceeding the value of the objects on which it is made, can be declared void at the request of

* J. A. FOOTE. Priv. Intern. Jurisprudence. Edit. 1878. p. 326. et seq.

the money-lender, if it be proved that the borrower has acted fraudulently. If no fraud exists, the contract holds good to the amount of the value of the objects pledged for the sum advanced; the surplus of the sum advanced is repaid with the legal interest.

7°. No money may be advanced, on bottomry, to sailors or seamen on their wages or allowance for travelling expenses. (See with regard to wages § 62, sub-section 8). *

8°. No money may be advanced, on bottomry, either on freight to be earned alone, or expected profit alone, nor exclusively on these two objects combined. Neither can general average be the subject of a bottomry bond. † In these cases, and in that mentioned in sub-section 7°., the money-lender is only entitled to the payment of the advanced sum, as noted in sub-section 2°.

9°. A loan on bottomry, contracted, in a home-port, by the master of a ship,—when he has means of communicating with the owner,—without written consent of the owners, or, in a foreign country, without complying with the formalities stipulated in paragraph 69°., sub-section 1, gives no right of preference, except for the share which the master may have in the objects hypothecated. ‡

Liability of owners.

10°. The shares of each part-owner of the ship, —even of such as have not contributed what was legally due by them towards the outfit of the vessel,—are liable for loans contracted on bottomry or otherwise, for repairs or purchase of provisions (§ 67).

* ARNOULD. Marine Insurance. Edit. Maclachlan, 1877. p. 43, et seq.

† LEONI LEVI. Edit. 1863. p. 795.

‡ "The Master has a right to hypothecate the ship and cargo, though lying in a port of the same country in which the owners reside, provided he has no means of communicating with the owners." Arnould. *l. c.*

Rank of preference.

11°. Money taken up on behalf of the last voyage of the ship, is a preferential debt to that of unpaid purchase-money and to any debts contracted for preceding voyages. Money raised in need, by the master, during and for the voyage, has preference above that borrowed before the ship's departure; and if several loans have taken place in the course of the same voyage, the last loan always has the preference before those previously contracted. Of two or more bottomry bonds the latest has always the priority. But bottomry debts contracted on one and the same voyage, in the same port of shelter, and during the same detention, have mutually equal right.

12°. He that lends money on bottomry on goods laden in a ship, designated in the contract, does not sustain the loss thereof, even when caused by the dangers of the sea, if the goods have been trans-shipped in another vessel, unless it be proved that the trans-shipment was caused by unavoidable causes.

13°. In case bottomry is taken on goods before the commencement of the voyage, it must be mentioned on the bills of lading and on the manifest, with designation of the person to whom the master must give notice of his safe arrival at the stipulated places of discharge. In default of this, the consignee, who, relying on the bills of lading received, has accepted bills or made advances, is privileged above the holder of such bottomry-bond. In default of the designation above required, the master, as not knowing to whom he has to give notice of his arrival, may also have the goods landed, without making himself in any way responsible to the holder of the bottomry-bond in that case.

14°. He who has, dishonestly, landed goods charged with bottomry, to the prejudice of the

holder of the bottomry-bond, thereby becomes personally responsible for the payment of the bottomry-debt.

15°. When the bottomry-contract does not contain any particular stipulations, the sea-risk of the money-lender begins:—

a. With respect to the engaged ship, her rigging, implements of war and provisions,—at the moment of her sailing, and it ends at the time she comes to anchor or is moored at the place of destination.

b. With regard to the goods,—as soon as they are loaded in the ship, or in the lighters which must bring the goods on board, and,—if the bottomry has been contracted on goods already shipped during the voyage,—on the day on which the contract was closed. In both these latter cases the risk ends as soon as the goods are landed or ought to have been landed at the place of destination.

16°. If, after the closing of a contract of bottomry, the voyage of the pledged ship and goods is not proceeded with, the money-lender can claim the restitution of the sum advanced, with only the *legal* interest thereon, as a preferential debt, unless the risk had already begun to run for his account; in which case he has a right to the marine interest.

17°. The money-borrower is personally responsible for the advanced sum and the marine interest, if the voyage is altered by his fault or with his consent, or if the pledged ship or goods, either by internal corruption, or by fault, villany, purpose or neglect of the borrower, diminish, deteriorate or perish.

18°. If the objects pledged are totally lost, or captured and confiscated, and the loss or capture has been caused by an unforeseen casualty or by superior power, during the time and on the voyage for which the money was advanced, the repayment of the sum advanced cannot be claimed. If a part of the objects pledged is saved, the money-lender has a right of recourse thereon, but no further than it can yield.

Bottomry, contracted in need, does not support any other average, than the damages resulting from those losses or deminutions as are attached to the nature of the agreement as described in the beginning of this section, (p. 332), unless the contrary has been expressly agreed upon. *

19°. In the event of any disaster befalling the pledged ship or goods, or of their being captured, the money-borrower must, on receiving information thereof, immediately bring this to the knowledge of the money-lender. Without prejudice to the master's obligations, the money-borrower, when being near the objects pledged, is bound to use all diligence, (at the charge of the objects), to save them. When proving negligent in either case, he is liable to indemnification.

20°. He who, in case of stranding or wrecking of a pledged ship, pays expenses, which should have preference before the holder of a bottomry-bond, acquires the precedence of the original creditor. (Comp. § 66, sub-section 5, *a*).

XX.—*Prescription of Maritime Contracts.*

General principles with regard to the prescription of Maritime Contracts.

§ 76. Contracts in maritime commerce become prescribed in a certain fixed order, in conformity with the respective *lex mercatoria*.

* LEONE LEVI. Edit. 1863. Vol. II. p. 796. Forms of Bottomry and Respondentia Bonds.

In cases of concurrent jurisdiction (§ 49), the following rules, which give an idea as to the comparative value of the respective claims may be adopted.

1°. By the lapse of *one year* become prescribed the following claims, viz.:—

a. For payment of ship's freight, wages and pay of the master, officers and crew.

b. For payment of provisions furnished to officers and crew by the master's order.

c. For the delivery of merchandise.

d. For payment of what is due by passengers.

2°. The terms of these prescriptions begin to run as follow:—

Those *sub a*, with the end of the voyage. Those *sub b*, with the delivery of the provisions in question. Those *sub c* and *d*, with the arrival of the ship at the place of destination.

3°. The following claims become void by the lapse of *three years*.

a. All claims arising from supplies in behalf of the fitting-out and victualling of the ship, as also of timber, sails, anchors and what is farther required for the building and repairing, and, finally, for wages and work done to the ship.

b. All claim for damages caused by fouling, running down, drifting or collision. The term of the first mentioned prescription begins to run from the day of delivery of the articles, or completing of the work and that of the latter, from the day on which the event occurred.

4°. By the lapse of *five years* become void:—all claims resulting from bottomry-contracts or policies of insurance. The terms of these prescriptions begin to count from the day on which the respective agreement was made.

5°. All claims, between the parties concerned, to an assessment by way of general average, become prescribed *two years* after the termination of the voyage.

6°. The *privilege* on ship, freight and goods for *bottomry-debt*, ceases after the lapse of *six months*, after the ship's arrival at the place where the voyage ends, if the bottomry-bond has been granted within the limits of the same ocean, but after *one year* if it has been granted at any place on the coasts of continents in another hemisphere, than that where the voyage ends. These periods of time are doubled in case of maritime war.

7°. All claims against the master and the underwriters, on account of damages sustained by the goods shipped, are void, if they had been accepted without the inspection and valuation of the damage in the manner prescribed by the *lex loci executionis*, or if,—the damage not being visible outwardly,—the inspection and valuation have not taken place within the term fixed by the *lex fori*.

XXI.—*Collision.*

Rules with regard to the adjudication of collision.

§ 77. Cases of *collision*, like cases of *salvage*, says Sir Robert Phillimore, are considered as belonging to the *jus gentium*. * In all cases of collision upon the high sea, or, in territorial waters, between a foreign and a national vessel, or between two foreign vessels, the wrong-doer, whether he be foreigner or national, is judged by the existing International "Rules of the road at Sea," of 1879, containing *regulations for preventing collisions at sea*, to which all civilized Maritime Nations have given their adhesion. Damages, occasioned by running down, collision, or fouling

* Comm. Intern. Law, Vol. IV. 1874. p. 625.

are commonly judged by the *lex fori*. In concurrent jurisdiction the following rules might afford some solution in the case.

1°. When a ship, by the fault of the master or crew, runs down, runs foul of, or comes in collision with another, and thus damages her, the whole of the damage occasioned to the ship and the goods on board must be compensated by the master of the ship by which the damage has been occasioned.

2°. If it has been caused by faults on both sides, each of them bears his own damage. In this latter case, as well as in that alluded *sub* 1°.. the masters are bound to indemnify the owners of the ships and goods, without prejudice to their redress on the officers and crew, if grounds for it appear.

3°. If the running down, fouling, or collision has been purely accidental, each ship and cargo supports her and its own damage, without prejudice to what is stated in sub-section 7°.

4°. The preceding rule applies also if one of the ships is without cargo.

5°. If neither fault nor fortuitousness can be proved, and the cause of the collision is therefore dubious, the damage sustained by both ships and their cargoes, shall be added together, and the aggregate be supported by each of them in proportion to the respective value of the ships and cargoes. The amount of such part of the general loss as each ship and cargo has to bear, is assessed on each particular ship and cargo, in proportion to their value.

6°. If, after having been run foul of, or having been in collision with another, a ship is lost in the track or course, which it has been compelled to take, to reach a port of refuge in order to repair

the damage sustained, the presumption exists that the loss has been caused by the collision.

7°. If a ship while under sail or drifting runs foul of, comes in collision with and causes damage to another ship, which is riding at anchor or moored in a proper place, and this happens without any fault of her master or crew, she shall bear one half of the damage she has caused to the ship, which was anchored or moored, and her cargo, without this latter ship being chargeable with any part of the damage, sustained by the one, which was under sail or drifting, or her cargo. This indemnity is assessed on the ship and cargo, as general average. The said claim to one half of the damage does not exist, if the master of the ship lying at anchor or moored, might, without danger to herself, have prevented or lessened the damage, by slipping of cables, or cutting of moorings, or if he has not done this, when timely urged thereto, by or on the part of the master of the ship, which was under sail or drifting.

8°. If, a ship having got adrift and been driven on the cables or ropes of another lying at anchor near her, the master cuts those cables or ropes, and thereby causes this latter ship to part from her anchors or moorings and to get damaged or to be wrecked, the ship which had got adrift is bound to indemnify the whole of the damage she has occasioned to the other ship and her cargo.

9°. If ships lying in a harbour or dock, anchored or moored, and with or without parting from their anchors or getting adrift, come,—through a high tide, rough swell, storm, or other general accident or disaster, caused by superior power,—in collision with other ships lying near them, so as to cause damage to the latter, such damage is apported by each injured ship, as if occasioned

by disaster of the sea, and comes under the head of particular average.

10°. If a ship is aground so that she cannot be veered, the master has the right, in case of danger, to require another ship lying near, to weigh anchor or even to cut her cables and make way, provided she can do so without risk, and that the loss occasioned by her weighing anchor or cutting her cables, be made good to her. The master of such ship lying near, who in that case refuses or neglects to comply with the request, must compensate the damage occasioned thereby.

11°. All masters whose ships are lying at anchor, are responsible for the whole damage occasioned by their neglect of having a buoy or float on their anchors, unless they prove the same to have parted therefrom without their fault and without their being able to restore or replace the same.

12°. With regard to the liability of owners, Sir Robert Phillimore says, "by the general maritime law of Europe, the liability of owners for the wrongful acts of masters is limited to the value of the vessel and freight, and by abandoning these to the creditors the owners may discharge themselves * This limitation, however, did not form part of the common law of England or of the United States of America but was introduced by special statute. In England the value of the ship is now arbitrarily fixed at £8 per ton, in ordinary cases, and £15 per ton, in cases where the wrongful act has given rise to claims for loss of life or personal injury. And this law has been held to apply where the owners of a foreign ship sue an English ship in the Admiralty

Liability of Owners.

English Law.

* EMERIGON. Contrats à la grosse. Chapt. IV. Sec. 11. BOULAY-PATEY. Cours de Droit Comm. Vol. I. pp. 263–298. KENT'S Comment. Vol. III. p. 218. ABBOTT. on Shipping. Part III. Chapt. V.

Court for damage from a collision on the high seas." *

XXII.—*Salvage.*

Salvage.

§ 78. Salvage is the allowance or compensation made to those by whose exertions ships or goods have been saved from the dangers of the seas, fire, pirates or enemies. With regard to insurance, there is understood by the term salvage, the claim, to which an insurer is liable, for expenses necessary incurred in preserving the object of insurance from a loss for which he would be liable under the policy, and which is recoverable from him in virtue of an express clause in the policy, inserted for such a case, and known as the "sue and labour clause." † The aspect under which salvage is treated in the present section has regard to maritime laws regarding wrecks and casualties. ‡

Wrecks and Flotson. Under this head the following rules are applicable:—

Salvage in cases of shipwreck and Flotson at sea.

1°. It is not allowed to any one, even under pretext of wishing to assist or save, to come on board a ship without the express consent of the master or his substitute.

2°. Ships stranding or breaking up *on banks off the coast*, and goods, fished up *at sea* or on the *outward grounds*, may not be salved by any one, without permission of the master or his substitute, if he is present.

3°. If the master or commander, or the owner or consignee of the cargo is on the spot, the aforesaid ships and goods must be left at their disposal, and immediately given up to them by the salvors, against sufficient security for the salvage.

* SIR ROBERT PHILLIMORE. Comment. on Intern. Law. Vol. IV. Edit. 1874, p. 628.

† ARNOULD. Marine Insurance. Edit. 1877. p. 778.

‡ 17 and 18 Vict. Chapt. 104. §§ 458–470.

4°. Those who detain stranded ships or goods, which have been saved or rescued, or who do not immediately comply with the demand of the master or his substitute or the consignee or owners of the cargo, to give up the goods to them against sufficient security, lose all claim to salvage money or reward for help, and are moreover bound to make good all damage or loss caused by such retaining of the same.

5°. The charges and freight incurred by the transport of the goods from the place of salvage to their destination, are paid by those who receive them, without prejudice to the recourse to which they may be entitled.

6°. If ships or goods have been salved, rescued or fished up *at sea*, or *on banks off the coast*, without either the master or other commander or the owner or consignee of the cargo being present, or known to the salvors, the objects salved shall as soon as possible, be transported to the place nearest to that of the salvage, and delivered to the respective Consul or to such official, as, by the local laws, is charged with the functions of superintendent of wrecks, or, in default thereof, to the chief local magistrate of the place of salvage. By infringing the local laws of salvage, the salvor forfeits all claims to salvage, or reward for help, besides being liable to damage, cost and interest, and incurring the penalties, imposed by the respective laws.

Salvage in cases of stranding, and goods washed on shore.

7°. The same rules for salvage of shipwreck and flotson at sea or off the coast, hold good for those cases of ships stranding, wrecked, or broken up, or goods salved, *on or near the shore*, and are in like manner dealt with as stated in sub-section 6°.

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In the absence of the master or commander and the owner or consignee of the cargo, or the

respective agents, and in case no arrangements have been made by them, all articles washed on shore or taken from any wreck, shall be received and stored by either the official appointed for the purpose or by the respective Consul, and in default of both, by the chief local magistrate of the district in which the goods are salved. If, however, in case the goods are mixed, or, by any other cause, there exists any difficulty or difference in ascertaining positively the ownership of the same, the salving or securing shall exclusively, be effected by the local authority aforesaid, acting as superintendent of wrecks. In cases of concurrent jurisdiction, under extra-territoriality, or capitulation, the respective Consuls may, jointly, appoint one or more persons to act, *in casu*, as *receivers of wrecks*, with power to value the property in respect to salvage claims. *

* With regard to the crimes of plundering wrecks, of obstructing the saving of shipwrecked property and with regard to the secreting of the same, the laws of England contain the following provisions.

"Whenever any ship or boat is stranded or otherwise in distress on or near the shore of any sea or tidal water in the United Kingdom, and such ship or boat or any part of the cargo or apparel thereof is plundered, damaged, or destroyed by any persons riotously and tumultuously assembled together, whether on shore or afloat, full compensation shall be made to the owner of such ship, boat, cargo, or apparel, by the inhabitants of the hundred, or of the county, city, or borough in or nearest to which such offence is committed."

"Every person who wrongfully carries away or removes any part of any ship or boat stranded or in danger of being stranded or otherwise in distress, on or near the shore of any sea or tidal water, or any part of the cargo or apparel thereof, or any wreck; or endeavours in any way to impede or hinder the saving of such ship, boat, cargo, apparel, or wreck; or secretes any wreck, or obliterates or defaces any marks thereon; in addition to any other penalty he may be subject to, for each such offence, incurs a penalty not exceeding fifty pounds; and every person, not being a receiver or a person hereinbefore authorized to take the command in cases of ships being stranded or in distress, or not acting under the orders of such receiver or person, who, without the leave of the master, endeavours to board any such ship or boat as aforesaid, does, for each offence, incur a penalty not exceeding fifty pounds; and it is lawful for the master of such ship or boat to repel by force any such person so attempting to board the same. If any person takes into any foreign port or place any ship or boat stranded, derelict, or otherwise in distress on or near the shore of the sea or of any tidal water, situated within the limits of the United

8°. In the cases in which the official mentioned in sub-section 7°., or in default of such, the local authority, or receiver of wrecks, is qualified to assume the management of goods stranded, salved or fished up, he makes a proper inventory thereof, and is subject, with regard to the delivery of the objects, to the same obligations as the salvors, who have rescued or recovered the ships or goods at sea, or on the banks off the coast, as stated in sub-section 6°. They receive for their exertions such reward as is stipulated by the local regulations. The masters or owners of the ships or goods, are, reciprocally, liable, with regard to such official or local authority, or receivers of wrecks, to the same obligations, as towards other salvors, with respect to the salvage dues.

9°. Superintendents of wrecks or local authorities acting as such are bound to report to the respective Chief-Officer of their Government, on all the cases above alluded to, occurring in their district, and on what has been done by them in the same.

After obtaining authorization of their chiefs, they have, without delay, the public sale effected, according to the custom of the place, of such goods as remain unclaimed, or the damaged state or perishable nature of which makes the warehousing unadvisible, or positively contrary to the interest of the owner.

They must give notice of the salving within the term of time fixed by law, through advertisement in properly circulating newspapers, mentioning all marks and particulars, and, at the same

Kingdom, or any part of the cargo or apparel thereof or anything belonging thereto, or any wreck found within such limits as aforesaid, and there sells the same, he is guilty of felony, and is subject to penal servitude for a term not exceeding four years." 17 and 18 Vict. c. 104, ss. 477–479.

time, summoning all and every one, who consider themselves entitled to what has been saved, to claim it. The summons shall be repeated, from time to time as stated by the respective law. If, however, the little importance of the goods saved renders it advisable, the summons may, with the consent of the respective Chief Authority, be provisionally put off to include them later in a notice of other cases. These rules are likewise applicable to the respective Consul, when acting as superintendent of wrecks etc. for his nationals, by virtue of treaty stipulations, or under condition of extra-territoriality or capitulation.

10°. If any person proves his right to what has been saved by bills of lading or other sufficient documents, his property shall be delivered to him, against the payment of the salvage and other charges. In case of doubt as to the right of the claimant, of opposition made by third parties or of differences about the salvage or charges, the parties must have recourse to judicial decision. The judge may, in this case, order the goods to be delivered under sufficient security, in conformity with the rules of the *lex fori*.

11°. The general rule with most States is that no strand-dues *(Strandrecht)* are levied by the Government on goods or ships stranded or salved; whether they be national or foreign property.

Distinction between remuneration for help and Salvage money.

12°. For assistance afforded towards saving ships or goods in need or distress, from fire and dangers of the sea, reward is naturally due to the helper or salvor, in accordance with the merits of each case. But there are two distinct classes of rewards attached to cases of wreck and casualties, viz., *remuneration for services rendered* and *salvage money*. These are separately dealt with in the rules given in sub-sections 13°–17°.

13°. Remuneration for services rendered by way of help is allowed, when ships and cargoes have, with the help and assistance afforded, been restored to a condition of safety, at sea or in a port, either together or after unloading and lighting.

14°. In estimating the amount of remuneration due for help or assistance, the following points are to be taken into consideration :—

a. The speed with which the helpers have exerted themselves to afford assistance, on the first observation of danger.

b. The time consumed by the services rendered.

c. The number of persons necessarily employed in rendering assistance.

d. The nature of the services rendered.

e. The danger which attended the operations.

15°. *Salvage* is awarded in the following cases :—

a. When ships or goods are rescued at sea, or fished up, found, or salved on the shores.

b. When goods are salved out of a ship, which grounded on the coast or within the surf, the ship being in such a dangerous situation as to render her position unfit as a place of safety for the goods or the crew.

c. When goods are salved from ships which have actually gone to pieces.

d. Finally, when ships are abandoned by the master and crew in consequence of their dangerous position or want of shelter on board, or in case the master and crew have left a ship or been taken from on board to save their lives, and the ship in question is subsequently

taken possession of by salvors; provided ship and cargo are subsequently brought, either entirely or in parts, into a safe port, by the salvors.

Adjudication of Remuneration for Help and Salvage-money.

16°. In estimating the amount of remuneration due for help or salvage, not only all the circumstances mentioned in sub-sections 14° and 15° must be considered, but also the danger out of which the things saved have been rescued, and the value of what has been salved, as estimated by competent persons.

17°. In case of difference, the rewards for assistance, help or salvage, are fixed by qualified appraisers, appointed by a competent Court.

18°. When a ship, after having been abandoned by the master and crew, has been taken charge of by salvors, the master or commander shall nevertheless at all times be at liberty to return to his ship and resume the command thereof, in which case the salvors must, on forfeiture of their remuneration, and with liability for damages, immediately give up the command to the master, without prejudice to their right to salvage already acquired.

19°. If rescued ships or goods, delivered against security at the place of salvage, perish between the place of salvage and that of destination, without their value having been determined in order to fix the amount of salvage, it shall be estimated by competent persons according to an equitable estimate of the value which the ships or goods probably had at the place at which they were delivered.

20°. Differences about remuneration for help and for salvage are decided by the *lex fori* of the place where the vessel stranded or was brought in; or, if the ship is lost, where the goods have been salved.

21°. All contracts or agreements about compensation for *help* or *salvage*, made either at sea or on stranding, with shipmasters, commanders or owners, with regard to ships or goods in peril, can be modified or annulled by the *lex fori*. Every one is at liberty, when the danger is over, to treat and agree amicably about compensation for salvage or assistance. Such agreements, however, do not bind owners, consignees or insurers, if they have not given their consent thereto.

XXIII.—*Insolvency and Bankruptcy.*

Objects of Bankruptcy Laws.

§ 79. Bankruptcy laws affect more particularly traders. Though such laws may include all insolvent persons, they are intimately connected with commercial laws, as forming an essential part of the *lex mercatoria*. "The leading objects of a bankrupt law," says Timothy Walker, "are four: *First*, to compel an equal distribution of the effects of the bankrupt among his creditors, without preference, in proportion to their claims; for which purpose the law defines what shall be considered acts of bankruptcy; and, from the moment of committing one of these acts, the power of the bankrupt over his property is at an end and the commissioners are appointed to take possession, and to settle with the creditors. *Secondly*, to exempt not only the person of the bankrupt from imprisonment, but also his future acquisitions from liability for his then existing debts; for which purpose the creditors are compelled to take their respective portions of his effects, in full discharge and satisfaction of their claims. *Thirdly*, to promote honesty; for which purpose not only is the discharge made dependent upon the honesty of the bankrupt, but severe penalties are annexed to dishonesty. *Fourthly*, to encourage future efforts; for which purpose, if all is found to have

been fair and honest, not only is the bankrupt released from future liability for past debts, but he is allowed a small sum out of the wreck of his fortune, with which to begin the world anew. Such are the general features of a bankrupt law, and their humanity and equity would seem sufficient at once to commend them to every mind." *

Comparative legislation in Bankruptcy.

Bankruptcy procedures affect the persons and properties, especially in mercantile communities, of every country, in nearly equal proportions. Therefore a certain amount of reciprocity in the respective bankruptcy laws of mercantile countries is absolutely necessary. Through direct legislation, however, little is done as yet, and though some mutual understanding is arrived at, thanks to the international *comity* of Law Courts, a great deal is yet left to be done, by legislation, in this branch of Private International Law, to arrive at that harmony of proceedings, so essential to mutual security in trade. The following are the principal features in which the greater part of the different national Law Courts agree.

Insolvency.

Every person who suspends payment is to be judicially declared to be in state of *insolvency (faillite)*, either at his own request or at that of his creditors, or at the requisition of the competent public authority. This does not exclude the possibility of the insolvent debtor being himself an innocent sufferer, and whilst the law provides for the rights of the creditors, it undertakes also, as we have seen above, the protection of the debtor.

Bankruptcy.

By the term *bankruptcy*, is more particularly meant that condition of insolvency, in which the insolvent committed certain acts, which may afford evidence of an intention on his part, to

* TIMOTHY WALKER. Introd. American Law. Edit. Bryant Walker, 1874. page 145.

avoid the legal payment of his debts, or to defeat or delay his creditors. *

Bankruptcy is either *simple* or *fraudulent*. This distinction depends on the following circumstances.

Simple Bankruptcy. The insolvent debtor is liable to be committed by the Court for simple bankruptcy, under any of the following circumstances. *Simple Bankruptcy.*

a. If the disbursements made for his household or house-keeping, which he is bound to enter in his journal, are judged to be extravagant.

b. If it appears that he has suffered important losses, either in transactions purely hazardous, or in fictitous operations of exchange, or on merchandise, depending merely on hazard or chance.

c. If it appears, from his last balance-sheet, that, with the intention to delay his insolvency, he borrowed large sums, or sold goods at a loss and under the market-price; while his debts exceeded the assets of his estate by fifty per cent.

d. If he issued bills of exchange, or other commercial paper of circulation, for more than thrice the amount of the assets of his estate, according to his last statement and balance-sheet.

e. If he has not made the legal declaration of insolvency, as required by law, on his suspension of payment.

f. If, while at large, he has not appeared though regularly summoned in his cases.

* LEONI LEVI. Intern. Comm. Law, Vol. II. Chapt. XXVII. 46 and 47, Vict. Chapt. 52. (Bankruptcy Act of 25th October, 1883).

g. If his books, although without any traces of fraud, are irregularly kept, or if he does not produce all his books, or has not made an exact inventory of his estate.

Simple Bankruptcy is prosecuted before the Correctional Court, which, in case of conviction, orders its sentence to be posted up and to be inserted in the newspapers which it indicates.

Fraudulent Bankruptcy.

Fraudulent Bankruptcy. The insolvent is prosecuted as a fraudulent bankrupt under the following circumstances.

a. If he represented feigned disbursements or losses as real or has not entered all his assets.

b. If he concealed any sums of money, any debts owing to his estate, any goods, merchandise, or any personal estate.

c. If he entered in his books fictitious sales, loans or donations.

d. If, in collusion with pretended creditors, he represented fictitious debts of his estate as real, by making out fraudulent deeds or documents, or by acknowledging himself to be indebted, without material cause or any value received, either by private or official bond or deed.

e. If, when charged, either by special mandate or as trustee, with the keeping of monies, commercial papers, goods or merchandise, he applied to his own benefit the monies or the value of the property vested in him, by virtue of such charge or trust.

f. If he bought personal or real estate under a feigned name.

g. If he hid away his books, or did not keep any books, or if his books do not show the real state of his affairs, or do not present a true statement of his assets and liabilities.

h. If, after being released from the custody, under which he had been placed, either with or without bail for his re-appearing when called, he failed to appear when regularly summoned, without legal cause of prevention.

Fraudulent bankruptcy, and participation therein, is prosecuted as all other acts of felony, and the sentences are made public, by posting them up in public and by publishing them in such newspapers as the Judge shall designate. Further shall be declared an accomplice of fraudulent bankruptcy, and punished for felony, any person who may be convicted of having conspired with the bankrupt to conceal any of his personal or real property, or to defraud the estate thereof, or to have acquired or contrived false claims against the estate and persisted in the attempt to have the same admitted as real and true, even when affirmation upon oath could be judicially required.

General rules with regard to insolvent estates.

Subject to the provisions of the *lex fori*, the following general rules of the *lex mercatoria* are usually followed with regard to the adjudication of insolvent or bankrupt estates.

Filing declaration of insolvency.

1°. A person or company suspending payment is bound to make *a declaration of insolvency*, in writing, in such form as directed by the *lex fori*, at the office of the registrar of the loc Court having jurisdiction in bankruptcy. copy of such declaration, certified by the re trar, serves as evidence of the act. The decl tion of insolvency must be filed within tl

days,—(or within the term fixed by the *lex fori*), —after the suspension of payment.

With regard to partnerships under a firm, the declaration of insolvency must contain the name and domicile of each of the partners individually liable for the whole.

Petition of creditors.

2°. The petition for adjudication of insolvency, by creditors, is presented in writing accompanied by the proofs or indications of the facts and circumstances, which show that suspension of payment has actually taken place. The petition is filed in the office of the registrar of the Court having jurisdiction in bankruptcy, and the date of presentation is to be duly recorded in a register kept for the purpose. The Court decides, as soon as possible, on the petition, after having heard the debtor, who is summoned for the purpose, through a letter from the registrar.

Insolvent estate of a deceased person.

3°. The estate of a trader, deceased after having stopped payment, can be declared to be in a state of insolvency, whether his heirs avail themselves or not of the right of consideration, or accept the inheritance unconditionally or under privilege of inventory, or reject the estate. The declaration of insolvency has the judicial effect of separating the estate of the deceased from that of his heirs, in the manner as prescribed by the *lex domicilii*.

Legal effects of the adjudication of insolvency.

4°. The state of insolvency is reckoned to begin with the day of the debtor's declaration, or from the day of presentation at the Court of the petition of the creditors, or, finally, from that of the requisition by public authority, as mentioned above. Where no time is named, the cessation of payment and the beginning of the insolvency is deemed to have taken place from the time in which the judgment declaratory of the insolvency was rendered. The judgment is posted up and inserted in the newspapers both of the place

where the insolvency has been declared, and of the places where the insolvent has commercial establishments.

The judgment declaratory of the insolvency divests the insolvent of the management and control of his property, even of what thereafter may fall due to him during the time he continues in a state of insolvency. With respect to the estate of a deceased insolvent debtor, this rule applies also to his heirs, in the case mentioned above in sub-section 3°.

Effect upon seizure of goods.

5°. The adjudication of insolvency also implies that, from the date of declaration of insolvency, no action can be answered or instituted but by or against the curators or assignees. Judgment execution against personal or real estate of the debtor, commenced before the declaration of insolvency, is suspended, and, for the same reason, no judgment of corporal restraint will be executed. In the case of a judicial suit to reclaim goods, sold and delivered, having commenced before the declaration of insolvency, this is continued against curators or assignees of the estate on whom the sentence is to be executed. This also applies to every suit whereby some particular object is reclaimed as property.

Effect upon suits.

Effect upon sales begun.

6°. If, before the insolvency or bankruptcy of the debtor, the eviction of his personal or real estate was so far advanced, that the day of definitive sale thereof was fixed and made known by public announcement, bill-posting etc., the curators or assignees can, by authority of the Court, cause the sale to be proceeded with, for account of the estate, without prejudice to rights of precedence, pledge or mortgage.

Effect upon transactions, commenced shortly before the declaration of insolvency.

7°. All funds paid for debts, not yet due at the commencement of the state of insolvency, or contracted by the debtor within forty days pre-

vious to the declaration of insolvency, or within any term fixed by the *lex fori*, must be restored to the estate, without prejudice to the prosecution which may be instituted for simple or fraudulent bankruptcy, as the case may be.

Mortgages or pledges.

8°. Pledges or mortgages, granted by the debtor within *forty days*, (or within such other term as fixed by the *lex fori*), before the commencement of the failure, are void in the two following cases.

a. If granted as security for engagements entered into before that time.

b. If they have been granted as security for engagements entered into within that term, but not directly established by the original agreement.

These rules are not applicable to mortgages which a trustee or curator is bound to give as security for his administration.

Donations.

9°. All donations of personal or real estate, made by the debtor, are judicially void with respect to creditors, if they have taken place within the term of *sixty days*, (or within such other term as fixed by the *lex fori*), before the commencement of the insolvency, even if parties should have acted in good faith. That term is doubled, in case the donee is related to the donor, by kindred or by marriage, in the ascending or descending line indefinitely, or, in the collateral line, to the fourth degree inclusively. This is applicable also if the donation has been made to the donee by means of intermediate persons.

At whatever time the donation has taken place, it can be annulled for the benefit of the creditors, if it is proved that the donor was aware of the unfavourable state of his affairs, even if the donee acted in good faith. A suit for this annulment becomes void, as soon as the curators or assignees

have delivered their accounts, in accordance with the rules for the settlement of the estate, as laid down by the respective *lex fori*.

Deeds.

10°. All deeds by which the debtor has transferred the property of personal or real estate by an onerous contract, and, generally, all dealings whatsoever, and at whatever time they have taken place, can be annulled, by sentence of a competent Judge, at the requisition of creditors, if they prove that the same were intended by both parties fraudulently to wrong the interests of the creditors.

Debts exigible after time.

11°. By insolvency or bankruptcy, debts not yet due, but running at the charge of the insolvent debtor, become exigible and must be settled accordingly. If the debt, however, was to be paid off by yearly instalments, or only to become exigible after the lapse of three years or later,—(or within any term fixed by the *lex fori*),—without the debtor being in either case liable to the payment of interest, the capital, for which the creditor is acknowledged in the estate, shall be estimated by the Court, according to the lesser actual value resulting therefrom and with regard to the computation of time.

Conditional claims of creditors.

12°. If claims on the insolvent or bankrupt party appear, the existence, the exigibility, or the amount of which depend on the fulfilment or non-fulfilment of certain conditions, at a future time, and the liquidation of the estate cannot, consistently with the interest of general creditors, be delayed till the final issue, one of the following modes of settlement is usually adopted, according to circumstances, viz.:—

a. The claim of the particular creditor shall, in case of commutation, be estimated, by competent experts,—and, if neces-

sary, fixed by the Court,—according to the principal amount of the debt, and in proportion to the loss which the estate may suffer by the non-fulfilment of the conditions, and according to the profit which the creditor can enjoy by the release from the fulfilment of these conditions.

b. If such valuation is either deemed impracticable on account of the nature of the case, or unadvisable in the general interest of parties, the commutation shall not take place, but the creditor shall be acknowledged for the full amount of his conditional claim, and, in proportion, the dividend be paid to him, against satisfactory security for the restitution with legal interest, for as much as it may appear later, that the conditions, to which his claim is liable, have not been properly fulfilled in accordance with the nature of the contract.

c. If such security cannot be obtained, or in case the Court may deem it more advisable, in view of existing circumstances, for the general interest of parties, the Court can order the amount of the dividend to which the creditor would later on be entitled, to be deposited in the consignment-fund, until the fulfilment or non-fulfilment of the conditions in question shall be made sure of. The amount thus reserved, is afterwards, in conformity with the fulfilment or non-fulment of those conditions, either paid to the particular creditor with the interest which accrued thereon, (after deduction of charges), or restored to the estate,

for the benefit of general creditors or claimants entitled.

Conditional properties of the estate.

13°. If things be found in the estate of the insolvent, which belong to him conditionally, or of which he can only dispose conditionally, the sale thereof shall be ordered to be made in such a manner, that the purchaser be charged with the fulfilment of the conditions, unless the nature of some peculiar case, and the interest of general creditors, should cause the Court to deem it more advisable to order the settlement to take place in the manner stated in sub-section 12°. (*a*, *b*, or *c*) or to leave the thing unsold until the final settlement of the estate.

Conditional debts secured by pledge.

14°. If a conditional debt is secured by pledge, and it is for the good of the estate to leave the holder thereof in possession of the object pleged, he comes in as a consenting creditor, at the final issue, and has a claim only for what may then be left in the estate. If, on the contrary, the good of the estate does not require that the holder of the pledge should be left in the possession of it, the same rules apply as above mentioned in sub-section 12°.,—with this difference, that in the case stated under *a*, the creditor need not give up the pledge, until the sum be paid to him at which his claim is valued,—for as much as that sum can be recovered on the object; and that, in the cases mentioned under *b* and *c*, such amount, as corresponds with the real value of the object pawned, be paid to him or deposited in the consignment-fund, against restitution of the pledge.

Debts secured by mortgage.

15°. If a debt is secured by mortgage, the rules laid down by Common or Civil Law with regard to the dissolution of mortgage bonds are applicable in conformity with the nature of the contract. At the final settlement the creditor holding the mortgage has a claim as concurrent

creditor, for what comes short on the pledge, in proportion to what may then be left in the estate.

Annuities and life-rents.

16°. As to yearly, monthly and other similar bequests, donations or allowances, the rules laid down by Common or Civil Law, with regard to life-rents or annuities, are applicable, in conformity with the nature of the contract.

Curators for the management of the estate in behalf of the creditors. Official assignees.

§ 80. The Court by which the insolvency or bankruptcy is declared appoints one or more curators or assignees, for the management and adjustment of the insolvent estate. These curators or assignees cannot be released or replaced except by an order of the Court. All this is to be done in conformity with the rules of the respective *lex fori*. The rules regarding the *official assignee* are laid down by the *lex fori*.

With regard to the measures devolving from the declaration of insolvency or bankruptcy and the powers vested in the curators or assignees, the following are the rules of the *lex mercatoria* usually followed.

1°. Besides making mention of the day of commencement of the insolvency, the sentence of adjudication of insolvency contains the following provisions, viz.:—

a. The appointment of one or more curators or assignees. These are by preference chosen from amongst the creditors, or on their nomination.

b. The charge to the curators or assignees to provide for the security of the estate by putting on seals and taking other suitable measures.

2°. The Court can at all times release curators or assignees or any of them, and cause them to be replaced by others, either by authority of the

Court or at the request of creditors. The Court can, in like manner, add one or more creditors as curators to any already appointed. At the meetings of creditors for the verification of claims the Court consults with the creditors regarding the appointment of curators. It belongs, however, to the exclusive domain of the Court to decide and make the appointment as it may deem expedient for the good of the estate.

Arrest of the bankrupt and his release on bail.

3°. By the sentence of adjudication of insolvency, or afterwards, at the option of the Court, the Judge can order that a bankrupt be placed in custody, either in prison or under arrest in his own dwelling, in charge of a sergeant or official guard. The Court is qualified, on the report of the curators, or at the request of the bankrupt, after proper security and bail is given, to cause the debtor to be released from custody. The amount of the bail is fixed by the Court, and, on non-appearance, when summoned, the bail is forfeited for the benefit of the estate.

4°. On every occasion on which the debtor's presence is required for the transaction of business relative to the estate, he can, if in gaol or in a place of arrest, be brought into Court. The measures necessary to prevent his escape are ordered by the Court.

Right of appeal of the debtor and of his creditors.

5°. A sentence of adjudication of insolvency or bankruptcy is put into execution without delay, notwithstanding opposition or appeal to a higher Court. The insolvent or bankrupt, after having been heard by the Court, has the right of appeal until fourteen days after the announcement in the newspapers of the sentence declaring the insolvency or bankruptcy, (as mentioned in sub-section 7), the day of the advertisement not included. If he has not appeared, he has the right of opposition during the same period. He can, in this

case, enter an appeal, until the *fourteenth day* after which the judgment on the opposition has been brought officially to his notice; the day of giving notice being likewise not included in this case. The right of appeal and opposition, is pursued against those at whose request, or on whose requisition, the sentence declaring the state of insolvency or bankruptcy has been given. Creditors whose petition to have their debtor declared insolvent or bankrupt, has been rejected, have likewise the right of appeal during fourteen days from the day of rejection. With the exception of those at whose requisition the declaration of insolvency or bankruptcy has been given, all other creditors and all parties interested have a right of opposition, in all declarations of insolvency or bankruptcy, till the *thirtieth day* after the publication of the sentence in the newspapers, and, in case of rejection, they have a right of appeal till the *fourteenth day* after official notice has been given, counting as aforesaid. All terms regarding right of opposition or appeal run equally for all parties concerned, wherever residing or domiciled, and are determined by the *lex fori*.

Duties of curators or assignees.

6°. The curators or assignees must, immediately after their appointment, make oath before the Judge, that they shall faithfully execute their charge.

Places and modes of publication in matters of insolvent estates.

7°. They are bound to have posted up, within three days after their appointment, an extract from the sentence declaring the insolvency or bankruptcy, mentioning the name, the domicile, and the business of the insolvent or bankrupt, the names of the curators or assignees, and the day of commencement of the insolvency. This extract is to be posted:—

a. At the respective Consulate, and, in case of commercial partnerships, at the place where the office of the partnership is established.

b. At the building where the Court assembles, and likewise at the public exchange, if any exists at the place.

c. The said extract must, moreover, within five days after the appointment of the curators, be inserted in one of the newspapers of the community where the Court is established, or, in default of such, in a newspaper to be designated by the Court.

The Seals.

8°. In case of insolvency or bankruptcy of a partnership, the sealing-up, if ordered, takes place as well in the principal office, as in the dwelling of each of the partners liable for the whole.

9°. If the sealing-up has not been effected already by the Judge or Consul, the curators must cause it to be done without delay, and send into the Court a certificate and report concerning the sealing.

10°. The curators or assignees have power to require, at or after every sealing-up, that any bill or paper at short date, or any document which must be presented for acceptance, existing in the estate, be given up to them, and they are to make mention of such surrender in their certificate and report of the sealing, with accurate description of the particulars.

Carrying on the trade.

11°. On the proposal of curators the Court may make an order, that, to obviate considerable loss to the estate, the trade of the insolvent or bankrupt shall not be abruptly stopped, but shall be continued for some time for the benefit of the creditors, by the curators or assignees or by a manager under their superintendence. In such case the curators

can require that the documents necessary for the business, be not put under seal. The Court can at all times repeal or alter these measures, at the curators' proposal and after hearing the insolvent if necessary.

Inventory of the Estate.

12°. The curators subsequently proceed to the inventory, and cause themselves to be assisted by competent persons for the valuation of the things, unless the insignificancy thereof should induce the Judge to leave the valuation to them personally. The insolvent, when called to assist, is bound to give all information and to make all disclosures required concerning his estate, and he can be compelled by the Court to declare on oath, whether he possesses any other or more goods than those found in the estate, and, if so, to deliver or indicate them to the curators.

13°. If the sealing has taken place, the inventory is made up by the curators, progressively as the unsealing is being proceeded with, in the presence of the respective official assignee or judicial authority, and the inventory is to be signed also by them. Previous to and during the making up of the inventory, the curators can require that the books, papers and documents of the insolvent be handed over to them, and they must make mention thereof, and of the state of the books, on the inventory.

14°. If no sealing has been ordered, the inventory is made before a notary public, unless the Court should, on account of peculiar circumstances of the estate, allow the curators or assignees to do so by private deed, in which case this deed must, without delay, be filed at the office of the Registrar of the Court.

Balance-

15°. If the bankrupt has made out his balance-sheet previous to the declaration of insolvency, he must hand it over to the curators or assignees

within 24 hours after their entering upon their duties.

16°. The balance-sheet must contain the statement and valuation of all the personal and real estate of the insolvent or bankrupt, the statement of debts and claims, with mention of the names of the debtors and creditors, and such indications as may facilitate a survey of the situation of his affairs.

17°. If the balance-sheet has not yet been made out, the bankrupt must do so, either personally or by an authorized substitute, in the presence of the curators or assignees or some one appointed by them. The insolvent or bankrupt or his attorney has, for that purpose, access to the books and papers under the superintendence and control of the curators or assignees.

18°. In case the insolvent or bankrupt neglects or refuses to make out the balance-sheet, or has died without having done so, the curators proceed to draw it up themselves, with the help of the books and papers of the insolvent or bankrupt, and by using all such information and elucidation as they can procure.

Witnesses to be heard.

19°. The counting-house clerks or others, in the service of the insolvent or bankrupt, cannot refuse to give such information or explanation. The Court can take their evidence, on oath if required, as to the data on which the balance-sheet has been made up, and also as regards the causes and circumstances of the insolvency or bankruptcy. The wife or widow, the children, and other descendants, or the parents or grand-parents of the insolvent or bankrupt are usually not officially or legally interrogated in the case.

20°. The curators or assignees receive all funds belonging to the estate and give receipts for the same.

21°. They may open all business letters directed to the insolvent. If the insolvent is on the spot, he can be present at the opening.

22°. Under approbation of the Court, the curators or assignees can give up to the insolvent and his household, the clothes, linen, and furniture required for their use; a statement whereof is to be made out. Where no prosecution for fraudulent bankruptcy has been instituted against the insolvent, the curators or assignees can be authorized by the Court to provide, according to circumstances, out of the ready money at hand, for the maintenance of the household during the time the process of liquidation might last. The Court then fixes the sum to be expended for that purpose.

23°. The curators or assignees report to the Court, whenever this is requisite, on all matters regarding the estate. The Court maintains the necessary superintendence and control and decides on all differences which may arise concerning the insolvent estate, in matters within its jurisdiction.

24°. The curator or assignees are bound to perform all acts requisite for the preservation of the rights of the estate and its claims on the debtors of the insolvent.

Verification of Claims. List of acknowledged creditors.

25°. The meeting of creditors for the verification of debts, the admission of claims, of preferences, pledges or mortgages, of conditional debts (§ 79, sub-section 12) and the proceedings with regard to the making up and closing of the list of acknowledged creditors are all regulated by the *lex fori*.

26°. If the admission of one or more of the creditors is disputed by the curators or by a co-creditor, or a difference arises about the motion of discharge of the *conditional claims* (alluded to in § 79, sub-section 12 and following), the Court shall give judgment in the case in conformity

with the *lex fori*, if the Judge cannot bring parties to agree on a compromise in the case. The curators or assignees are in duty bound to plead for the security of the rights of the estate in all litigations respecting the verification of claims.

§ 81. *Composition in Insolvency.* The insolvent is qualified to offer a composition to his joint-creditors. The following rules of the *lex mercatoria* are then usually observed. *Of Composition in insolvency.*

1°. Some eight days, at least, previous to the convocation of the first meeting for the verification of the claims, the insolvent must deposit at the office of the Registrar of the Court a scheme of composition.

2°. The deliberation and decision on the scheme of composition takes place on a day fixed by the Court.

3°. Only those creditors are entitled to deliberate and decide upon the composition offered, whose claims are acknowledged, and who have been placed as such on the list of acknowledged creditors, together with those who are acknowledged as such by decision of the Court. The privileged creditors, and those who hold a pledge or mortgage, have no vote unless they renounce their privilege, pledge or mortgage in favour of the estate. This renunciation has no effect unless the composition is agreed upon.

4°. If at the meeting, at which the composition is deliberated upon, other creditors appear who have not attended the previous meeting, they shall be admitted, provided no difference arises about the verification of their claims, and that they take the oath immediately, if required.

5°. Those creditors, who have previously appeared by attorney and whose oath had been required, shall likewise be admitted after they shall have taken oath either personally or by attorney.

6°. For the acceptance of the composition there is required the consent of *two thirds* of the concurring creditors, representing, jointly, *three fourths* of the amount of the claims, which are unprivileged and not covered by pledge or mortgage; or otherwise *three fourths* of these creditors, representing *two thirds* of the said amount.

If *three fourths* of the creditors present, representing more than *one half* of the amount of the claims, agree to the composition, the deliberation can be postponed by the Judge to a new meeting.

7°. The agreement regarding the composition, shall, after its acceptance, be immediately signed by all the creditors who have acceded thereto.

8°. The result of the decision is noted in the records and sanctioned by the Court within eight days after the expiration of the term left for opposition, as noted in the following rules, viz.:—

a. The creditors whose claims were acknowledged at the time of deliberating on the composition, and who have *not* acceded thereto, can oppose the sanction, provided a written statement of the opposition be delivered by them to the curators and to the insolvent, and a copy thereof deposited at the Registrar's office, all within eight days succeeding the day of acceptance of the composition, that day not included.

b. The opposition can, amongst other motives, be grounded on the fact that the assets exceed considerably the amount of the composition proposed.

9°. In case of opposition, the Judge fixes a day on which it shall be heard by the Court. Notice of this must be given by the curators or assignees to the opposing creditors, as soon as possible,

and at least eight days before the day fixed for the hearing of the case. The insolvent is qualified to appear, to defend and explain the grounds of his composition.

The creditors who have acceded to the composition, or who have not been present at the deliberation thereon, can attend the sitting and join in the litigation.

10°. After expiration of the term allowed for opposition, whether any has taken place or not, the Court shall, on the conclusions of the curators, give judgment on the composition.

11°. The sanction of the Court makes the composition binding for all creditors without exception, known or unknown, including such as may come forward later on; without prejudice to the rights of such creditors as have preference or are holders of pledge or mortgage. Those however, who came forward after sanctioning of the composition by the Court cannot, in any case, claim from their co-creditors any return on account of dividends which have been distributed out of the estate in compliance with the agreement of composition, without prejudice however of their right against the bankrupt for the amount of the composition.

12°. When the judgment by which the sanction has been accorded, has acquired force of execution and notice thereof has been given to the curators or assignees, these latter are bound to account to and to settle with the insolvent. All differences arising on this head can be settled by arbitration. If no other stipulations have been made by the agreement of composition, the curators or assignees give up to the insolvent, against his proper discharge, all goods, monies, effects, books and papers belonging to the estate.

Discharge on granting the composition.

13°. On granting its sanction to the composition, the Court is competent, to rehabilitate at once the insolvent who has acted throughout in good faith. In all other cases, rehabilitation takes place in the manner as described below in paragraph 83.

14°. If no compensation has been offered or accepted, or the sanction of the Court has been refused, the Court declares the estate insolvent and orders the same to be adjusted by the curators or assignees.

Of the adjustment of the insolvent estate. Proceedings of Liquidation.

§ 82. As soon as the mandate mentioned in sub-section 14 of the preceeding paragraph has been issued by the Court, the curators or assignees proceed with the adjustment of the estate, under observance of the rules laid down by the respective *lex mercatoria i.e.* the customs of the place. With regard to the rights of the holders of pledges, the redeeming of objects pledged or of mortgaged estates, the provisions of the Civil Law are to be observed.

Ranking and Classification of Creditors.

After termination of the sale of the personal as well as real estate, a statement is made out, by the curators, of the acknowledged creditors who, on the verification of their claims, have alleged preference, pledge or mortgage. For that purpose they take over the titles of the claims, against receipt. A statement is drawn up of the general classification, showing the proceeds of the different objects sold, the order in which each of the said creditors is entitled and the sum for which he is definitively admitted, and finally, the sum which, in consequence, may remain for the benefit of the concurring creditors.

The curators or assignees are ranked as first privileged on the whole proceeds, for the charges incumbent on the bankruptcy, inclusive of their remuneration.

That remuneration is usually fixed at *one per cent.* of the proceeds of the personal and real estate sold, of the other receipts, and of the ready money found in the estate, without prejudice to the power of the Court to allot further to the curators or assignees an additional sum for special time employed, if this is deemed equitable on account of the importance of the services rendered.

The statement of classification, together with the vouchers, deposited by the curators at the Registrar's office, may be ordered by the Court to remain there for public inspection during the term fixed by the *lex fori*. This fact is announced in such newspaper or newspapers as the Judge shall indicate. The term begins to run on the day following that of insertion in the indicated newspapers. If no opposition has been made within the term aforesaid, the classification is definitively closed by the Judge, after which no opposition whatever is admitted. In case of opposition, the closing of the classification is deferred, until the questions which may have arisen have been settled by a definitive decision of the Court. The opposition is made at the Registrar's office, either by declaration or official notice, (stating in either case the grounds of opposition), and further proceedings are taken thereupon in conformity with the *lex fori*.

All the questions which have arisen are, as far as possible, decided by the Court in one and the same judgment.

If the interest of any holder of a pledge, or mortgage creditor, makes it desirable not to await the result of the final classification, and if a special assignment of rank does not wrong the other creditors, the Court can, at the request of the person concerned, after hearing curators,

order a separate classification to be made as to the proceeds of either personal or real estate, to be specially designated in the order. In that case, the creditor is paid out of the proceeds of the object pledged, and the mortgage thereon, if there be any, is canceled.

After the final closing of the classification, the Court orders all mortgages on goods sold to be erased, in conformity with the rules of the Civil Law on this head.

The funds remaining in hand, after the classification, for the benefit of concurring creditors, are proportionately divided between them. With the consent of the Judge, the curators are qualified, however, to make a provisional distribution of dividends, out of the funds available for the purpose, before the settlement of the classification. The Judge fixes on each occasion the amount of the provisional distribution, and the manner in which notice shall be given to the creditors of the distribution to be made.

18°. The mortgage creditors participate, in proportion to the full amount of their claims, with the concurring creditors, in such distributions as take place before the payment of the price of the mortgaged property.

The amount they might thus provisionally receive, is deducted afterwards, from what they shall appear to have a right to, out of the proceeds of the mortgaged property, and the sum provisionally paid them comes back to the general estate.

The preceding rules also apply to pledges and privileged debts.

Claims of the wife outside the community of goods.

In case of insolvency or bankruptcy of the husband, the wife takes back "*in natura*" all personal and real estate belonging to her and not included in the community of goods. It must

be proved in accordance with the rules laid down by Civil Law what property or jointure, brought in by her at her marriage, has been excluded from the community of goods.

The acquisition of personal estate during the marriage by inheritance, legacy or donation to the wife, not coming into the community of goods, must appear by a description made thereof, or by other proper documents, to the satisfaction of the Court.

All goods proceeding from the investment or re-investment of funds belonging to the wife, exclusive of the community of goods, are likewise taken back by her, provided the investment or re-investment be proved by proper documents to the satisfaction of the Court.

The wife exercises her right as mortgagee like other creditors of that class. She participates with the other concurring creditors, for her personal claims.

The property taken by the wife, as mentioned above, continues liable for the mortgages or debts with which it was legally encumbered.

The wife has no claim on the estate on account of advantages settled by the marriage-contract; reciprocally the creditors cannot be benefited by the advantages settled by the wife on the husband by marriage-contract. An ante-nuptial settlement on the wife, however, would be protected.

International usages of Law Courts, with regard to the power of curators or assignees.

According to the usages adopted by the Law Courts of most countries, the curator, syndic, trustee or assignee in an insolvent estate has the right to draw into the estate and liquidate all the property of the insolvent, wherever situated. By virtue of the proceedings, commenced under the bankruptcy law of the insolvent's domicile, the curators or assignees are sometimes admitted to

have the right of attachment and to distribute the property *pro ratâ*,—either preferentially or *pari passu*,—among all the creditors, wherever domiciled; but, in the same way as testamentary executors, the curators or assignees of an insolvent estate cannot exercise their functions in a foreign country, without having previously obtained the authorization of the Court which has jurisdiction over the property (movable as well as immovable) of the bankrupt. But although the above stated usages are based on the just principle of acting beneficially in the interests of the mass of creditors, they are not as yet adopted by the Law Courts of all countries. According to the views of some, the right of the assignee or curator in bankruptcy to the property of the bankrupt, found or situated in a foreign country, is subject to the same usages which govern the transfer of movable and immovable property, by *deed* or *will* and *marital rights*, and thus cannot bar proceedings against the property by citizens of these countries in their own Courts. The Court of the foreign country, where property of the bankrupt is situated, secures priority to its own subjects, as *bonâ fide* creditors, against those of the country where the bankruptcy certificate was issued, following its own bankruptcy law with regard to the effect of priority of creditors, and thus excluding all non-domiciled claims and, of course, invalidating all private transfer of property to trustees or curators, by an insolvent person, for the benefit of all creditors equally, when this act operates against domiciled creditors. As to the rest, bankruptcy laws are, for the most part, based on the commercial usages in vogue in the different countries; though it is frequently allowed to give preference to the attaching creditor against the law of what is termed the *locus*

concursus creditorum, which is the place of the debtor's domicile (Wheaton, § 142). However, prior judicial proceedings of the foreign curator or assignee, taken in the Court of the State where the property of the bankrupt is situated, are generally upheld, and sequestration once acknowledged is invariably maintained. *

Rehabilitation of the insolvent. Certificate of discharge.

§ 83. *Rehabilitation of the insolvent.* The insolvent who has not been rehabilitated in accordance with the rule mentioned in sub-section 13 of paragraph 81, on the sanction of the agreement of composition with his creditors,—or the heirs, in the case mentioned under rule 3° of paragraph 79,—is qualified to present a petition of rehabilitation to the Court which has adjudicated the insolvency (§ 79, No. 2), even if the insolvent should be residing elsewhere. In this case the following rules are observed.

1°. To rehabilitation are not admitted those who have been declared guilty of fraudulent sale, or who have been sentenced for fraudulent bankruptcy, theft, imposture, or abuse of money or goods entrusted to them.

2°. The petition of the insolvent or bankrupt or his heirs is not admissible, unless accompanied by a certificate showing that all the creditors have been arranged with to their satisfaction.

3°. The petition is posted up in the manner and places mentioned in sub-section 7 of paragraph 80. It is moreover published in such newspaper, or newspapers, as the Court shall order.

4°. Every creditor is qualified to oppose the petition within two months after the announce-

* STORY. On Conflict of Laws. Edit. Redfield, § 338, pp. 403–423, 341–347. PHILLIMORE. Vol. IV. Ch. 39, pp. 590–621. MERLIN. Repertoire, Faillite et Banqueroute. WHEATON. Elem. of Int. Law. Part II. Chap. II. § 88. VON BAR. §§ 78, 79 and 128. Translation by G. R. Gillespie, p. 311, et seq. and pp. 594–612.

ment aforesaid, by a petition, filed at the office of the registrar of the Court, or by such deeds or within such period of time as stipulated by the *lex fori*. That opposition can be founded only on the fact that the debtor has not duly complied with the prescriptions of the law as mentioned above in sub-section 2°.

5°. After the expiration of the said two months, the Court shall give judgment according to the conclusions of the public prosecutor, grant or refuse the request, whether opposition has been made or not.

6°. If the request be granted notwithstanding opposition, or is refused, the opposing party can in the former and the insolvent or bankrupt in the latter case appeal to a higher Court.

7°. As soon as the sentence pronouncing the rehabilitation has acquired legal force, it is, at the request of the rehabilitated party, read off publicly in the audience hall of the Court, and inserted in its records.

8°. If the rehabilitated party should reside elsewhere, he can require that reading and recording should take place further also in the Court of his actual place of residence.

Certificates of discharge with regard to International usages.

A certificate of discharge obtained by an insolvent in the country where he is domiciled (with nationality of domicile, § 40), and where his business transactions took place, is valid as regards all his creditors in every other country, to the extent provided for by the respective bankruptcy or insolvency laws (the *lex loci*), provided there is a complete extinguishment of the debt. But this is the case only when the contract, from which the liability evolved, was made within the jurisdiction of the State whose Court granted the certificate of discharge, and provided that the latter was not coupled with the condition

that the discharge have effect in any specified country, for then the contract can only be dissolved by the laws of that country where it is to have effect (the *lex loci executionis*).

This general rule is based on the principle of the law of contracts (§ 55), viz., that a contract derives its character, validity and durability from the *lex loci contractus*, so that the bankruptcy and insolvency laws of any country must be supposed to form a tacit part of the obligations of every contract, made in that country with its citizens; which implies that the debtor may be discharged from his obligation in the manner prescribed by its bankruptcy law.

But when, by the *lex loci*, there is no virtual or direct extinguishment of the debt itself, but only a modification of the remedy to enforce the obligation; such as an exemption from arrest and imprisonment *(contrainte par corps)* on a *cessio bonorum*, while the contract remains still legally valid, the *lex loci* has no effect on that of the forum of the foreign creditor. The *lex loci* being, in this case, a law of remedies, it belongs to the *ordinatoria litis*, which, as being strictly local, cannot form the *lex fori* of a foreign Court, as each State controls the remedial processes to be pursued in its own Courts. *

XXIV.—*Surcease of Payment.*

Surcease of payment a personal moratorium.

§ 84. Surcease of payment is a sort of *private moratorium* granted in conformity with the respective Municipal Law, to traders, who, either by circumstances of war or by other unforeseen calamities, are rendered unable for the time present to satisfy their creditors, but who can show by

* STORY. Conflict of Laws. § 571. VON BAR. §§ 78, 79 and 128; translation of G. R. GILLESPIE, p. 311, et seq. and pp. 594–612. WESTLAKE. Priv. Intern. Law. § 441. DANA. On Wheaton's Elem. Int. Law. §§ 88, 89–144, Notes Nos. 93–95.

a balance-sheet of their estate, corroborated by proper vouchers, that, by the delay to be allowed them, they shall be enabled to pay them in full.

Surcease of payment is only granted by the highest authority after hearing in the respective Law Court, in conformity with the *lex fori*, and for a limited time, usually not exceeding the term of twelve months.

The surcease of payment has the same effect outside the State as a certificate of discharge in bankruptcy for the period of time for which it is granted.

XXV.—*Foreign Judgments and Foreign Legal Instruments. Evidence of Foreign Laws. Commissions Rogatoires.*

Exterritorial operation of foreign Judgments.

§ 85. Judgments of foreign tribunals of competent jurisdiction *(lex judicata)* constitute in most Law Courts, where parties claim the benefit of it, *primâ facie* evidence.

In civil cases such evidence is received as proof of a debt but subject to contest by the defendant so that a new judgment, in conformity with the *lex fori*, is required for its execution. Like contracts and testaments, sentences of a foreign competent Court have the strength of legal or authentic deeds of evidence on the principle of *locus regit actum*, but the execution is subject to the *lex fori*.

In criminal cases.

A judgment in a criminal cases, pronounced by a foreign Court, cannot have execution within the jurisdiction of any independent State, but it is an authentic proof for a claim of extradition, and a valid sentence, whether of conviction or acquittal, pronounced by the competent judicial power of one State, has the collateral effect of being a bar *(exceptio rei judicatæ)* to a prosecution for the same offence in another State which has jurisdiction as regards the offence; except in case

a criminal has fled to the foreign State to obtain there a milder sentence or when a sentence of acquittal was passed in another State than that within whose territory the offence is alleged to have taken place. *

In personam.

With regard to exterritorial operation of judgments *in personam*, the general comity, utility and convenience of Nations established a usage among civilized States, by which final judgments rendered in personal actions, in competent Law Courts of one State have the conclusive effect of a *res adjudicata* in every other State. This rule depends, however, upon the principle of reciprocity existing among States. † The personal status being governed by the laws of the political nationality (§ 51), judgments given by the competent foreign Court in this matter are usually admitted.

Ad rem.

In real actions the sentence of the competent Court is generally respected, when the affair is brought up, incidentally, in litigation in a foreign Court.

Opinion of Halleck. Of Wheaton.

With regard to foreign judgments, Halleck makes the following statements.

"Foreign judgments or sentences of a Court of competent jurisdiction, proceeding *ad rem*, such as the sentences of prize-courts, courts of admiralty, and revenue-courts, are conclusive as to the proprietary interest in, or title to, the thing in question, wherever the same comes incidentally in controversy in the tribunals of another State."

"Whatever doubts may exist," says Wheaton, "as to the conclusiveness of foreign sentences, in

* WHEATON. Elem. Intern. Law. § 121. Dana's Note, No. 80 and § 138. WESTLAKE. Private International Law. Chapt. II. HALLECK. Intern. Law. Vol. I. Chapt. VII. WOOLSEY. Introduction, § 77.

† WHEATON. Elem. Intern. Law. §§ 138–147. VATTEL. Droit des Gens. Liv. II. Chapt. VII. § 84. DE MARTENS. Droit des Gens, §§ 93, 94 & 95. KLUBER. Droit des Gens, § 59.

respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, whenever the title to the specific property, which has been once determined in a *competent* tribunal, is again drawn in question in any other Court or country."

"If a foreign Court exercises a jurisdiction which, according the law of Nations, its sovereign could not confer upon it, its sentence or judgment is not available in the Courts of any other State, and the Courts, in which such judgment is brought in controversy, will determine the question of jurisdiction for themselves; but so far as its jurisdiction depends upon municipal law, or its proceedings are governed by municipal rules, it is the exclusive judge of its own jurisdiction and of the regularity of its own proceedings, and its decision, on these points, binds the world. Of its own jurisdiction, says Chief Justice Marshall, *so far as depends on municipal rules*, the Court of a foreign Nation must judge and its decision must be respected. If the proceedings are merely irregular, the Courts of the country, pronouncing the sentence, were the exclusive judges of that irregularity, and their decision binds the world. Thus, if the Court of one country condemns a vessel as a prize under the law of Nations, and the sentence is brought in controversy in the Court of another State, the latter may examine into, not only the authority of the former to act as a prize court, but also whether the vessel condemned was in a situation to subject her to the jurisdiction of that Court. But if the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitæ*, is held of universal obligation, as to all the matters of right

and title which it professes to decide in relation thereto. And this results from the very nature of the case, for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of Nations, therefore, the judgment of the *forum rei sitæ* is held absolutely conclusive. *Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.* And the same principle is applied to all other cases of proceeding *ad rem*, as to movable property, within the jurisdiction of the Court pronouncing the judgment. Whatever that Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in another country, where the same question comes, directly or indirectly, in judgment before any other tribunal." *

Evidence of foreign laws.

§ 86. Questions of evidence, to prove foreign laws as well as their applicability to the case in litigation, are decided by the respective Law Court *(lex fori)*.

Foreign written laws, judgments, wills, contracts and other instruments are authenticated by a certificate annexed to the document, declaring the document to be the original instrument or a true copy of the same, as the case may be. This certificate must be signed and sealed by some duly authorized notary public or Government officer, whose signature must be authenticated by the chief of the Department of State under whose cognizance the affair comes. As the signature in question will be unknown in a foreign country, it must always be legalized by the Representative, Diplomatic or Consular Agent, of the State in whose Law Court or before whose authorities the document in question is intended to be produced.

* HALLECK. Intern. Law. Vol. I. §§ 31 and 32.

Foreign unwritten laws, customs and usages must be proved by the testimony of competent jurisconsults, whether verbal on oath, before the respective Court, or by written certificate, duly authenticated as stated above for written laws. *

With regard to evidence of foreign laws, Timothy Walker makes the following statements. "The general rule respecting evidence, is that its competency must depend upon the law of the forum. But in the case of deeds, wills, and other instruments of writing, it would seem to be almost a matter of necessity that the evidence which would be sufficient to prove their execution in the place where made, should be held sufficient everywhere. With respect to foreign laws, their existence must be proved like any other facts, before the Court will take notice of them. And the same is true of foreign judgments. The mode of proof varies according to the nature of the case. The great seal of a nation is sufficient to authenticate a foreign written law or judgment, but not the seal of a Court, except it be a Court of Admiralty. So a copy, sworn to be a true copy, will be held sufficient. But the unwritten laws and usages of foreign nations are proved, either by the exhibition of printed reports, or by the oaths of persons having the means of knowing, or sometimes by the certificates of persons in high authority." †

Commissions Rogatoires.

§ 87. By judicial commission of investigation, generally known by the term *commission rogatoire (literæ mutui compassus sive requisitoriales)*, is understood a certain request addressed by the

* HALLECK. Intern. Law. Edit. Sir Sherston Baker. Vol. I. p. 200. HEFFTER. Le Droit Intern. de l'Europe. Traduction Bergson. Edit. 1873, page 69. STORY. Conflict of Laws. §§ 629–643. WESTLAKE. Priv. Intern. Law. Chapt. XII.

† TIMOTHY WALKER. Introd. to America. Law. Edit. 1874, p. 760.

Court of one country to that of another, for the purpose of obtaining information on the subject matter of an action or suit pending in the former Court, in so far as the demand for investigation does not encroach upon the Sovereignty of the State upon whose Courts the demand is made. This demand can include all acts of instruction and procedure by which a judicial sentence is attained or which can afford grounds on which it is to be determined, as the hearing of witnesses under oath, the verification of facts, the exhibition of mercantile books and the receiving of oaths prescribed by the law of procedure, and, in some cases, also the serving of citations, and the obtaining of exequatur for the execution of sentences. *

With regard to hearing of witnesses, Professor von Bar makes the following statements. "The judge upon whom the demand is made conducts the procedure which is desired of him in the form which his own law lays down as essential to secure credibility and validity, and the law of procedure in the other country must allow evidence so taken full credence. † Witnesses, then, for instance, will not be required to subscribe their depositions, if that is not required by the law of the Court which takes the evidence, in order to secure credibility. The Court on which the demand is made may, however, at the special request of the Court which makes the demand, put in force

* MASSÉ. Vol. II. p. 48. VON BAR. § 124. ASSER. Sketch of Priv. Intern. Law, page 117.

† MASSÉ. Nos. 283–284; OPPENHEIM, p. 378; SCHAFFNER, p. 206; FŒLIX, I. § 246, *ad fin.* p. 476; LINDE, § 41, note 5; WETZEL, § 39. note 42. The judge who makes the demand for inquiry alone can determine whether the parties shall be admitted to the process, and must make the necessary notes on that point in his demand. "Evidence taken on oath before a magistrate in Leith was allowed the same weight as evidence before a German Court as it would have had in Scotland. Hamburg, 26th October, 1875." (Note of G. R. Gillespie).

forms which can be observed without doing violence to any absolutely prohibitory laws, or to the views of proper procedure which it may entertain, and without using any undue compulsion on a person who may be summoned as a witness or without laying any excessive burden upon the Court itself, while, of course, it must always respect the forms which its own law requires to give validity to testimony."

"On the other hand, it is entirely for the Court which makes the demand to say what meaning is to be attached to the result of any such inquiry; and that, again, depends upon its own law; it is that Court and that law that desire to be informed as to the existence or non-existence of particular facts; although, of course, unless the demand for information shall make some particular request to a different effect, the judge upon whom the demand is made, not knowing foreign law as a rule, and being in no case bound to recognize it, will conduct the process in the way pointed out in his own law." *

With regard to *Commissions rogatoires*, Sir Robert Phillimore makes the following statements.

"The civil jurisdiction to which a foreigner may have recourse or be amenable, is either voluntary or contentious."

"The chief organ of the voluntary jurisdiction is the notary public, who is, in fact, a kind of international officer, to the testimony of whose acts all civilized States give credit; an officer less known and more restricted in his powers in

* PROF. VON BAR. Das Internationale Privat-und Straf-recht. § 124. "Section 334 of the *Civil Processordnung* provides that proof which satisfies the requirements of the Court in Germany is not open to any objection that might have been urged against it in a foreign Court, by whose officials it has been taken." (Note of G. R. Gillespie p. 558).

England than on the Continent,—but in England also a well-recognized and important functionary. Recent English statutes have conferred upon the English Consul much of the authority of the notary." *

"Under this head of voluntary jurisdiction, also, should be considered those requests which the tribunals or authorities of one State are, in the execution of justice, obliged to make to the tribunals or authorities of a foreign State, to permit or enforce the investigation of facts or the acquisition of evidence in the territory of that foreign State. A commission generally issues for this purpose, which the French call *commission rogatoire*, a proceeding familiar to all acquainted with the proceedings of the civil law."

"These commissions are, almost invariably, respected by foreign tribunals; the formula given by Denisart expresses the foundation of pure comity on which they rest: '*Nous vous prions de . . . comme nous ferions le semblable pour vous, si par vous nous étions priés et requis.*' Till lately, England and the United States or North America, instead of directing the commission to the foreign tribunals, have been in the habit of entrusting their execution to certain of their own citizens, lawyers, magistrates, or consuls, as the case may be, a mode of proceeding which rendered it optional on the part of witnesses whether they would give or withhold their testimony; but by later statutes † English judges are empowered to issue commissions to the judges of a foreign Court; and by a more recent statute English tribunals are empowered to order the examination of witnesses in England in relation to a civil or

* 18 and 19 Vict. Ch. 42.

† 1. William IV. Ch. 22. 3 and 4 Vict. Ch. 105.

commercial matter pending before any foreign tribunals." *

"The English Courts have ruled that a commission may issue to the judges of foreign Courts, as individuals, to take the examination of witnesses, notwithstanding the examination may not be conducted according to the law of England. Yet it would seem that, if illegal evidence be returned, or if it appear either on the face of the return, or by extrinsic evidence, that the examination has been so conducted as to render it inadmissible, the whole or part may be rejected at *Nisi Prius*."

"In a recent case, a former commission issued by the same party having proved abortive, in consequence of the witnesses refusing to be examined by an English commissioner according to the English law, the Court, on granting a new commission to the foreign judges, imposed the payment of the costs of the former commission."

"In a case of *Pischer v. Sztaray* (heard before the Court of Queen's Bench, May 1858), a commission to examine witnesses, which had issued to the judges of a Hungarian Court as individuals, was returned unexecuted, and an affidavit of the defendant's attorney stated that he was told by a secretary of the Austrian Legation in London that the commission ought to have been addressed to the Court as a Court, and not to individual judges."

"Thereupon, the Queen's Bench ordered the commission to issue to the Court, as a Court, the usual clause prescribing the form of oaths to be omitted, the plaintiff having the opportunity, on the return of the commission, to object to the admissibility of the evidence taken under it; the costs of the abortive commission to be the plaintiff's costs in the cause, at all events."

* 19 and 20 Vict. Ch. 113.

"It has been considered to be no answer to an application for a commission to examine witnesses abroad, (supported by the ordinary affidavit), that the opposite party deposes that there are persons in this country, and documents accessible to the applicant, which would supply him with any information he could obtain from the witnesses he proposes to examine. And after a judge has exercised his discretion on such an application, the Court will not disturb his decision unless it is manifestly wrong."

"The Court has ruled that it will not permit a writ of *subpœna ad testificandum* to issue, to compel the attendance of a witness resident out of the jurisdiction, unless it be shewn that the evidence cannot be had under a commission, or otherwise than by personal attendance of the witness."

"As to the mode of executing a commission under the recent statute, the following decision is important. A commission having issued to be executed at New York, returnable in a month, with leave to defendant to cross-examine, there was, some weeks afterwards, a consent made by him that no objection to the admissibility of the evidence taken should be made by reason of the time of taking or returning such evidence, saving all just exceptions to the evidence. The commission was returned executed two or three days after such consent, having been executed without any notice to the defendant of the time at which he might attend its execution. It was holden by the Court that, nevertheless, the evidence taken under it was admissible at the trial." *

The *commissions rogatoires*, can be made also available to ascertain the *forms* of evidence as

* Whyte *v.* Hallet, 28, Law Journal. Exch. 208. Sir ROBERT PHILLIMORE. Common Intern. Law, Vol. IV. p. 690, et seq.

admissible in a foreign Court when these forms are not acceptable, as such, by the *lex fori*, although the value of the evidence, as to fact, may not be denied, as in cases of obligations *ex lege*, *quasi ex-contractu*, *quasi ex delicto*, *ex delicto* (§ 55), the evidence of such obligations being in most Courts regarded to be determined by the law of the place, where the act creating the obligation took place. *

Rules proposed by the institut de Droit International.

The following rules were adopted by the *Institut de Droit International*, in its session of 10th September, 1877, at Zürich, on the proposition of Professor Asser, member of a commission appointed by the *Institut* in 1874–1875 to report on Private International Law, † with regard to demands for informations on the subject-matter of actions in litigation, addressed to a foreign Court:—

a. "*Le juge saisi d'un procès, pourra s'adresser par commission rogatoire à un juge étranger, pour le prier de faire dans son ressort, soit un acte d'instruction, soit d'autres actes judiciaires, pour lesquels l'intervention du juge étranger serait indispensable.*"

b. "*Le juge à qui l'on demande de délivrer une commission rogatoire, décide:* 1°., *de sa propre compétence;* 2°., *de la légalité de la requête;* 3°., *de son opportunité, lorsqu'il s'agit d'un acte qui légalement*

* VON BAR. Das Intern. Priv. und Straf-recht. §§ 87 and 88. By the Italian Law this system is sanctioned in the stipulation of Art. 10, Section 2°., of the Dispozioni sulla Pubblicazione etc., of the Kingdom of Italy, which reads as follows:—"*I mezzi di prova delle obbligazioni sono determinati dalle leggi del luogo in cui l'atto fu fatto.*"

† The members of this commission were: Professors ASSER, VON BAR, BLUNTSCHLI, BROCHER, ESPERSON, P. FIORE, B. LAWRENCE, LAURENT, MANCINI, MASSÉ, WESTLAKE. The reporters were M. M. Mancini and Asser, who brought out each a separate report, to be found, respectively, on pages 329 seq. and 364 seq. of the *Revue de Droit International*, Tome VII, 1875. The report of Professor ASSER, having for its subject-matter the Civil process-laws, includes the rules for *commissions rogatoires*.

peut aussi bien se faire devant le juge du procès, p. ex. d'entendre des témoins, de faire prêter serment à l'une des parties, etc."

c. "*La commission rogatoire est adressée directment de tribunal à tribunal, après qu'on l'aura revêtue des preuves d'authenticité, prescrites par les traités.*"

d. "*Le tribunal à qui la commission est adressée sera obligé d'y satisfaire après s'être assuré:* 1°., *de l'authenticité du document,* 2°., *de sa propre compétence, ratione materiæ, d'après les lois du pais où il siège.*"

e. "*En cas d'incompétence matérielle, le tribunal requis transmettra directement la commission rogatoire ou tribunal compétent, après en avoir informé le requérant.*"

f. "*Le tribunal qui procède a un acte judiciaire en vertu d'une commission rogatoire applique les lois de son pays en ce qui concerne les formes du procès, y compris les formes des preuves et du serment.*" *

* *Annuaire de l'Institut de Droit International*, 1878, p. 44.

PART III.

MARITIME AND COMMERCIAL INTERNATIONAL LAW.

CHAPTER XI.

The Open Sea, Maritime Domain and Territorial Waters, and their Jurisdiction.

Mare Liberum.

§ 88. The open sea or main ocean is, like the atmosphere, free for common use to all mankind and cannot be appropriated by any State to the exclusion of others.

It is not so much the improbability of any power being able to actually occupy and maintain such a possession, but rather the total absence of all justifiable and reasonable grounds for such monstrous usurpation, which constitutes the principal argument against all claims of exclusive right over vast tracts of the ocean. The latter is by nature designed to be the common property of all mankind, even if it were physically possible for any one Nation to occupy and keep possession of it. This is, at present, the generally admitted principle of the Law of Nations. The recognition of this principle has put an end to the controversies which, at a less civilized period of European history, were raised by the arbitrary assumptions of some Maritime States claiming exclusive right of control and domain over portions of this common human property, for no practicable purpose whatever, but only to gratify an imaginary ambition of supremacy over other Nations, such as, in our time, is observed only in the case of semi-barbarous Eastern Potentates.

The famous *Mare Liberum* of Grotius (A.D. 1609), the erudite and cleverly written *Mare*

Clausum of Selden (A.D. 1635), * Puffendorf, in his "*De jure naturæ et gentium*," Libr. IV (A.D. 1672), Bynkershoek's "*De dominio maris dissertatio*" (A.D. 1730), and so many able writers after them, have exhausted the theme, while common sense, enlightened by an ever progressing civilization, has given judgment against the clever arguments of Selden in favour of the *Mare Liberum* of Grotius, and the open sea, as the necessary high-way of all Nations, has ever since been considered free for ever. Thus this celebrated question of the open sea can now fairly be regarded as *res adjudicata*, and the learned controversies which, until the beginning of this century, occupied the pens of the ablest publicists, as belonging to the domain of history. †

Maritime Domain (Mare Clausum). The King's Chambers.

§ 89. All natural waterways and passages, originally created by nature, (irrespective of artificial improvements superadded), and navigable by sea-going vessels, are internationally free with the exception of those waters situated entirely within the limits of one and the same State constituting maritime domain, which really could be called the *mare clausum* of the State to which the exclusive right of property and the jurisdiction over these waters belongs by virtue of their natural condition.

To the maritime domain belong:—

* Of this work Valin said, "*a la vérité il n'est pas possible de défendre avec plus d'esprit et d'adresse une cause de cette nature; mais enfin il n'emploi aucun argument qu'on ne puisse facilement réfuter.* VALIN. Nouveau commentaire sur l'Ordonnance de la Marine du mois d'Août, 1681. Vol. II. page 686.

† "It is sufficient to say, that the reason of the thing, the preponderance of authority and the practice of Nations, have decided that the main ocean as much as it is the necessary high-way of all nations and is from its nature incapable of being continuously possessed, cannot be the property of any one State." PHILLIMORE, Comm. on Intern. Law. Vol. I. § 172. ORTOLAN, Dipl. de la Mer. Edit. 1864. Vol. I. Chapt. VII. PERELS. Intern. Seerecht. p. 16.

1°. All ports, harbours and road-steads, enclosed by head-lands, islands or shoals which form part of the territory of a State.

2°. All open road-steads, or anchorages on the coast, being the resort of a town, village or public establishment, the limit being that of the anchorage ground.

3°. Those bays and gulfs whose shores and surrounding islands, shoals and head-lands are in legal possession and occupation of one and the same State, provided the distance intervening between the head-lands and enclosing shoals and islands is such as to enable batteries, established on the land, to control the passages to and the navigation of the inner waters, or otherwise does not exceed ten nautical miles (of 60 in the equatorial degree). These are termed closed bays, the entrance being regarded as defensible from the shore, in contra-distinction from those of greater width, which are regarded as open territorial-waters (§ 90). *

4°. All inland-seas and lakes, whose shores belong entirely to the territory of one and the same State.

5°. All narrow straits, channels or rivers, leading from the open sea through the territory of a State to an inland-sea, provided that the shores of the latter, as well as the shores or banks of such passage communicating with the open sea, belong to the same State.

* The general reservation made by France in the Fishery Treaty with England of 2nd August, 1839, Art 9 (de Martens Nouv. Recl. XII. 954) is the breadth of ten miles for the entrances of her inlets and recesses. Ten miles is also the breadth, stipulated for closed bays and indentations of the German Coast in the Fishery Treaty between the North German Confederation and Great Britain, of 1868. PERELS. Das Internationale öffentliche Seerecht der Gegenwart Edit. 1882, page 30–38. CALVO. Droit Intern. Edit. 1870. Vol. §190. ORTOLAN. Dipl. de la Mer. Vol. I. p. 160.

6°. Rivers which rise and debouch within the limits of the same State, keeping throughout their course within its territories, belong entirely to the domain of that State.

7°. Also the estuaries of the rivers aforementioned, provided that the breadth between headlands, shoals or islands, answers to the conditions, noted in sub-section 3, with regard to the closed bays. Such estuaries are then called closed estuaries. But the open estuaries, formed by the river delta outside that limit of breadth, are classed with open bays or gulfs, as will be noted in the next section.

The closed bays and river-estuaries, as described in sub-sections 3°. and 7°., represent what is called in England the *King's Chambers*. *

Every State has absolute right of property and jurisdiction over its maritime domain and by virtue of this right, so far as it is not modified by treaty or otherwise abandoned, each State may prohibit access to any or all of its ports, harbours, rivers, and road-steads to any or all vessels, or exclude all or any particular foreign vessel from the privilege of its coast-trade navigation *(cabotage)*, or subject these privileges to certain regulations, whether for the protection of the home trade, for fiscal interest or for political reasons. These prohibitions, however, can never be extended beyond the strict limits of the maritime domain, nor interfere with the international immunities of the territorial waters (§ 90), or be applicable to those vessels which, by stress of weather and other *causes majeures*, are obliged to take refuge in the nearest shelter of land or harbour. This is called the right of refuge *(droit de relache forcée)*, which

* PHILLIMORE. Comm. Intern. Law. Vol. I. page 284. WOOLSEY. Intern. Law, Ed. 1879. § 60.

is a maritime international usage recognized by all civilized Nations. *

Territorial waters. Adjacent seas. Maritime territorial jurisdiction.

§ 90. Apart from the exclusive right of property which belongs to each State, possessing a maritime domain or *mare clausum* as above stated, the jurisdiction of each State extends also over those portions of open bays or gulfs and open estuaries, of free inland-seas and lakes and of the open sea, adjacent to its territories, which are situated within a radius of three miles or 5555 meters from any point of its coast or territory (to be reckoned from low-water mark). This distance is presumed to be the range of the coast defences, but on the maxim that *terræ dominium finitur ubi finitur armorum vis*, it should be stated to extend to any point on the sea to which the cannon of actual coast defences on shore can carry a projectile. But as the carrying power of any given cannon is such a vague measure, the three miles radius is generally adopted. The miles here referred to are nautical miles *(miles, Seemeilen)*, sixty of which are equivalent to an equatorial degree, and measure nearly 1852 meters. Three of the latter are equal to one French league *(lieue marine, legua)* and four are equal to one geographical or Dutch mile which is calculated to measure 7407 meters.

This belt of the sea littoral constitutes the range regarded as necessarily belonging to the coast defences of the respective State and is termed its territorial waters *(mer territorial, Territorialmeer)*. The exclusive jurisdiction, which the State exercises over the said littoral, is called maritime territorial jurisdiction *(jurisdiction maritime,*

* KLUBER. Ed. Ott. § 130. DE MARTENS. Ed. Ch. Verger, § 42. W. E. HALL. Ed. 1880. Part II. Chapt. II. § 42. WHEATON. Ed. Dana, Part II. Chapt. IV. ORTOLAN. Dipl. de la Mer, Ed. 1864, Vol. I. pp. 140–148. HALLECK. Edit. Sir Sherston Baker, Vol. I. p. 140. WOOLSEY. Edit. 1879, §§ 60–62.

Hoheits-gewæsser. § 30). Within the limits of this jurisdiction each State has the exclusive right of coast-fishery *(pêche cotière, Küsten-fischerei)*, and may enforce its municipal laws and regulations with regard to territorial defences, sanitary measures, pilotage and navigation rules, customs control, strandings and flotson regulations, harbour and road-stead police, and other measures necessary for the safety of shipping and trade.

Outside the maritime domain, (which is constituted by the closed river-estuaries and the closed bays as noted in the preceding section), the littoral sea or territorial water is reckoned to begin from a straight line, drawn between the head-lands, islands or shoals which form the mouth or entrance of the respective closed river or bay, and between which the breadth is not more than ten sea miles. *

It is a principle of International Law that these marginal seas, or territorial waters are considered to be open to the navigation of all Nations up to the land, as near as practicable for sea-going vessels, but without right of fishery, and always subject to the respective maritime territorial jurisdiction. This jurisdiction, however, does not include the right to prohibit or completely obstruct the peaceable traffic of sea-going vessels. Even in case a State wishes to close all or some of its ports to certain foreign vessels, and deems it proper to place individual vessels nearing its coasts under certain restrictions by way of control and supervision for the sake of its internal public safety or to secure its fiscal revenue, yet such State cannot interdict the

* Fishery Treaty between France and Great Britain of 2nd August, 1839, Art. 9 & 10. Annales Maritimes et Coloniales, 1839, Part. I; p. 861. ORTOLAN. Dipl. de la Mer. Liv. II. Chapt. VIII. Ed. 1864, page 153, et seq. PERELS. Internationales Seerecht §5. Nationale Gewässer. British Territorial Waters Jurisdiction Act of 1878,

innocent use of its territorial waters in the case of way-ward bound vessels, using the passage of these natural waterways to proceed to their respective places of destination. On the other hand, a State may, for fiscal or defensive purposes, forbid foreign vessels from hanging around *(hovering)* or anchoring on its coasts, when not forced by stress of weather or accidents beyond their control. *

Narrow seas and canals.

§ 91. By virtue of the same principle of maritime jurisdiction, with free innocent passage to all Nations, are classed by International Law, under the term *narrow seas*, those straits and sea-arms, rivers or navigable waterways of every description, which unite two parts of the open sea or two navigable and internationally free waters, irrespective of the state, condition or circumstances with regard to the dominion of the shores, and notwithstanding the jurisdiction of the respective territorial waters.

The *narrow seas* are, in the eye of International Law, as free, as the waters between which they serve as the natural means of the intercourse of Nations, especially so when such straits, rivers or channels may afford, at any time, the shortest or safest passage for sea-going neutral vessels and thus serve as the natural route of the traffic carried on by such vessels.

The right of navigating internationally free waters, includes the right of passing through the straits communicating with these waters.

There is no reason for not including in this general rule all canals or narrow straits, connecting, for the benefit of outside and international navigation, two open and internationally free seas, although such a canal may be an entirely

* HALLECK. Intern. Law. Edit. Sherston Baker. Vol. I. p. 135, et seq.

or partially artificial channel, dug out for the said purpose and passing entirely through the territory of one Power. The legal status of such a canal, in the eye of International Law, is but the state it actually occupies in the intercourse of Nations, independent of its origin. Being once *de facto* established as an *international highway*, whether with or without tolls, the only concern of International jurisprudence regarding it is its *raison d'être*. This is exclusively the connection of two open seas, for without the pre-existence of a desideratum regarding the necessary intercommunication between these International properties, the canal would not have been in existence. Such a highway, having once been declared open to all Nations, can therefore not be legally closed again except on the principles which govern all natural narrow passages between open seas * (§ 93).

When narrow straits are only navigable by means of lighthouses, beacons, or buoys, the States which maintain these are entitled to reimbursement of the costs, but where no considerable expenses are incurred for the preservation of the waterway, this right is rarely used, as it is a generally adopted rule, that every State pays the expenses of the works, established on its own shores, although these might benefit passing vessels as well. †

Boundary of territorial waters in narrow channels.

The boundaries of the territorial waters of States, whose respective territories are divided by narrow channels not exceeding in breadth the limit of ten nautical miles (of 60 in the degree),

* Professor HOLLAND. On the Suez-Canal. Fortnightly Review. July 1883. Prof. LAWRENCE. On the Suez-Canal. Law Magazine and Review. February 1884.

† The claim of Denmark to impose the so-called Sund-dues, abandoned by Treaties in 1857, was originally founded on a consideration of the expenses incurred by that State to secure the safety of navigation in the Sund.

are supposed to meet in the middle of the channel concerned, which is considered to belong to the joint maritime jurisdiction of the co-riparian States with free passage to all Nations.

International character of rivers, lakes and inland seas.

§ 92. The first occupation of any part of the borders of a river is regarded to indicate an intention of taking possession also of the opposite river bank.

This principle is likewise applicable to the first occupation of any part of the shores of a lake; which act constitutes a *primâ facie* claim to the whole of the unoccupied shores.

Navigable rivers, traversing the territories of two or more States, are indiscriminately open to the innocent passage of all vessels going to and fro past the respective co-riparian States and thus internationally free. The old selfish system which prevailed during the middle ages, that the owner of one section of the river has, independent of treaties, no concern in the interest of any other co-riparian State, whether above or below the stream, has yielded to the better judgment brought to bear on this subject by the spirit of civilization, which asserted its influence in matters of free river navigation no less than in so many other spheres of human intercourse, where its constant action is perceivable in wearing off the crust of narrow-minded egotism which would maintain an antagonism between individual interests and the common weal. *

On the same principle, the navigation of inland seas and lakes, whose shores belong to two or more States, is to be regarded as free, subject to the joint maritime jurisdiction of the respective co-riparian States, in conformity with their boundary agreement.

* Art. 108–117 of the Treaty of Vienna of 1815. BLUNTSCHLI. Le Droit Intern. Codifié. Art. 314. WHEATON. Part II. Chapt. IV. §§ 11–19. HEFFTER. Le Droit Intern. de l'Europe. p. 155.

The Thalweg.

With regard to the case of a net-work of rivers traversing the territory of several States, the jurisdiction is regulated by the boundary treaties which always exist between co-riparian States and which generally admit the centre of the deepest channel, called the *Thalweg*, as the boundary line.

What is meant by internationally free navigation.

§ 93. Internationally free navigation or passage through territorial waters, straits, canals, rivers, lakes and inland-seas, as described above (§§ 90–92), implies freedom for the outside commerce and the right of outward international intercourse, so far as to secure unimpeded communication between individual States, by the use of those waters which are the natural highways of international commerce, or declared open to free peaceable navigation and passage by sea-going vessels from foreign countries of all nationalities, without compulsory trans-shipment of cargo or any charges for the commutation of any right of compulsory stoppage, but where required with reasonable compensation, under the head of tolls or dues, for pilotage services, lights, buoys, beacons and all other expenses, in behalf of the preservation of the waterway and the safety of navigation. By this it is obvious, that the international usage with regard to free passage in the above described case of territorial waters, narrow seas, canals, rivers, and lakes does not intend any infringement on the sovereignty rights of the States, whose territories the waterway divides, to make conjointly such regulation as may be required to limit this free traffic to peaceable intents or to purposes of harmless utility, to be determined and controlled by them.

Coast-fishery. Coast-trade ation.

Neither does this usage of free international passage include the right of coast-fishery (*pêche*

cotière, Küstenfisherei) nor the right of coast-trade navigation *(Cabotage, Küstenfrachtfahrt)* or that of trading with coasting vessels or with inland or river crafts by foreigners, without special agreement, by treaty or on general admittance, by municipal regulations of the respective States. *

Search to execute revenue laws in adjacent waters.

§ 94. With regard to the extension of the right of control beyond territorial waters, for the protection of the revenue of a State, it is admitted that within the territorial waters, which may be called the territory of Nations, *as within a marine league*, or in creeks and bays, the vessel of a friendly State may be boarded and searched on suspicion of being engaged in unlawful commerce, or of violating the laws concerning revenue. But further than this, on account of the ease with which a criminal may escape beyond the proper sea-line of a country, it is allowable to chase such a vessel into the high sea, and then execute the arrest and search which flight had prevented before. Furthermore, suspicion of offences against the laws *taking their commencement in the neighbouring waters beyond the sea-line*, will authorize the detention and examination of the supposed criminal. An English statute prohibits foreign goods to be trans-shipped *within four leagues of the coast*, without payment of duties. The act of Congress of the United States of America, of March 20th, 1799, contained

* Articles 108–117 of the Acte final du Congrès de Vienne, of 9th June, 1815, concerning free river navigation. GROTIUS, de jure belli, ac pacis. Book II. Chapt. III. VATTEL. Droit des Gens. Book. I. Chapt. XXIII. WHEATON. Elm. Intern. Law. Edit. Dana. §§ 177–205. CALVO. Droit Intern. Edit. 1870. Vol. I. §§ 188–233. PHILLIMORE. Comm. Intern. Law. Vol. I. Edit. 1879. Part III. Chapts. IV.–VIII. PERELS. Intern. Offentl. Seerecht, § 5, sub-section X. With regard to internationally free river navigation, see the valuable contributions by Mr. ED. ENGELHARDT, Minister Plenip. of France, former member of the Danube Commission, under the head "La liberté de la navigation fluviale," in the Revue de Droit International. 1879. p. 363 and 1881. p. 187.

the same prohibition; and the exercise of jurisdiction to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court of that country, in *Church v. Hubbard* (2 Cranch, 187), to be conformable to the laws and usages of Nations" (Kent, I., 31. Sect. II). * On the other hand, it is understood, that this exceptional right does not extend into foreign territorial waters, unless through special understanding between States with conterminous territorial waters (§113).

The right in time of war, of temporarily stopping neutral vessels, in any part of a Nation's own territorial waters, narrow seas, rivers, etc., for strategical purposes, which is acknowledged by the Law of War as the right of a belligerent State, does not belong to the ordinary right of jurisdiction over these waters.

* WOOLSEY, Intern. Law, Edit. 1879, p. 374.

CHAPTER XII.

INTERNATIONAL POLICE AND CONTROL ON SEAS WITHOUT JURISDICTION.

The open sea subject to International Law.

§ 95. From the foregoing it is obvious that, by the generally approved usage of Nations, the established rule of International Law is now that the open sea is unconditionally free and cannot be brought under the jurisdiction or control of any Nation to the exclusion of others. All have equal right of navigation, fishery and jurisdiction, which rights cannot be lost by prescription, being natural, self-sustaining and unalienable.

Where all nationalities have equal rights, where they meet each other with perfectly free motives, on the vastest neutral field of practical intercourse, there is the natural domain of International Law. Here each State exercises its sovereignty rights with equal mutual respect for the flags of all sovereign States, upheld by the established international usage among all civilized Nations. This mutual respect constitutes the first condition of the *mare liberum.*

Modern commerce is essentially maritime; hence the predominant international necessity of securing the safety of the open sea. It is obvious that the only guarantee for the safe navigation of the high seas consists in the mutual observance by all Nations of certain indispensable rules. These conditions are as follow:—

1°. Every vessel must belong to an acknowledged State.

2°. Each vessel should have a name, by which she may be identified, and distinct proofs of her nationality and identity, by carrying outward conspicuous tokens in the shape of flags and pendants, by having the ship's name and place of registry painted outside on the hulk, and finally by documents; all in conformity with the laws of the respective State and with the established international usages.

3°. Every vessel on the high seas is subject to the laws and jurisdiction of her own State.

4°. All respect is due to the established usages of International Law and existing treaty stipulations, with regard to the technical rules of navigation.

Every vessel navigating the seas must belong to an acknowledged nationality.

§ 96. The great ocean, and those parts of it, which, though territorial waters, are not yet under any special jurisdiction, are open to the free intercourse of vessels of all description and nations in different states of civilization, and thus, from the very nature of things, the oceans of the world are liable to become vast theatres of lawlessness and brigandage, to the detriment of peaceful commerce and of free intercourse between the inhabitants of the globe, which would finally lead to complete stagnation of civilization.

This was the case from the first rise of navigation in open waters, when the high seas, the territory of no one, were made the resort of all descriptions of criminals.

It is so difficult to bring the open sea under proper control, for the guarantee of life and property in the exercise of the rights of peaceable navigation, that it becomes indispensably requisite that every vessel should declare in an unequivocal manner, to which nationality she belongs, or else be treated, by all other Nations, as dangerous to common safety. The public vessels of any

State have full authority to arrest vagabonds roving on the high seas, who cannot make proper declaration of nationality nor produce proofs of legal means of existence, and to conduct such vagabonds to the nearest port of any civilized State as suspected pirates, in order to secure the safety of peaceable navigation and the liberty of the open sea.

The common interests of all Nations have placed this common field of the labour of all under those mutual guarantees which are procured by strict adherence to the principles of the Law of Nations. *

The Right of approach (droit d'enquete de pavillon).

§ 97. The vessels qualified, by general usage, to carry out this international police and control of the seas without special jurisdiction, are the public vessels of all civilized States. This usage has established a right which is called the right of approach or *droit d'enquête du pavillon*, which must be clearly distinguished from the right of visitation and search *(droit de visite)*, the latter being an exclusively belligerent right; nor must it be confounded with the right of visit, as agreed by the treaties for the suppression of the slave trade (§ 99).

With regard to international police and control or the jurisdiction to be exercised by civilized States or their agents, in places not within the territory of any State, Mr. Hall gives the following general views.

Mr. Hall's opinion with regard International Police and control in places not within the territory of any State.

"On the unappropriated sea and on land not belonging to any community so far possessed of civilization that its territorial jurisdiction can be recognized, it is evident that, as between equal and independent Powers, unless complete lawlessness is to be permitted to exist, jurisdiction

* ORTOLAN. Dipl. de la Mer. Chapt. IX, p. 163 and 228. PERELS. Das Internationale Oeffentliche Seerecht, pp. 21–47.

must be exercised either exclusively by each State over persons and property belonging to it, or concurrently with the other members of the body of States over all persons and property, to whatever country they may belong. The former of these alternatives is that which is most in consonance with principle. It has been seen that the State retains control over the members of the State community, when beyond its territorial jurisdiction in so far as such control can be exercised without prejudice to the territorial rights of foreign States, so that with respect to individuals there is always a State in a position to assert a claim to jurisdiction higher than any which can be put forward by other States; and, although jurisdiction cannot be founded on non-territorial property, so as to exclude or diminish territorial jurisdiction, the possession of an object as property forms least at a reasonable ground to attribute exclusive control to its owner, when no equal or superior right of control can be shown by another. Concurrent jurisdiction could therefore only be justified by a greater universal convenience than separate jurisdiction can secure, and in most cases, so far from universal convenience being promoted, it would be distinctly interfered with, by the admission of a common right of jurisdiction on the part of all Nations. It is consequently the settled usage that, as a general rule, persons belonging to a State community, when in places not within the territorial jurisdiction of any Power, are in the same legal position as if on the soil of their own State, and that, also as a general rule, property belonging to a State or its subjects, while evidently in the possession of its owners, cannot be subjected to foreign jurisdiction."*

* See § 47, Self-Jurisdiction.

"For special reasons, however, exceptions are sometimes made to this usage. It has been already pointed out that in time of war a neutral State frees itself from responsibility for acts done outside its frontier by its subjects, when they are not employed as its own agents, by allowing a belligerent to exercise so much jurisdiction over them and their property as is necessary for the protection of his right to attack an enemy in the various ways sanctioned by the customs of war. In such cases the right of jurisdiction is wholly abandoned within defined limits." *

"Concurrent jurisdiction, † again, is conceded by a country to a specific foreign State when subjects of the former take passage or service on board the vessels of the latter, and to all foreign States, when the crew of a ship belonging to it are guilty of certain acts which go by the name of piracy. Finally, when persons on board a ship, lying in or passing through foreign waters, commit acts forbidden by the territorial law, the local authorities may pursue the offending vessel into the open sea in order to vindicate their jurisdiction." ‡

Rights from which the right of approach is involved.

On the afore-mentioned principles of self-jurisdiction, abandoned jurisdiction, and concurrent jurisdiction (§§ 47–49), is based the right of the public vessels of any State to take cognizance of the flag and other *outward* tokens of nationality of any vessel encountered on the open sea or in other places not within the territory of any civilized State.

Thus the right of approach is involved from the above mentioned acknowledged international

* See § 48, Abandoned Jurisdiction.
† See § 49, Concurrent Jurisdiction.
‡ HALL. Intern. Law, Edit. 1880, p. 206.

rights. The maintenance of public security on the sea is one of the objects of the Common Law of Nations and whatever can contribute to the maintainance of the security of the sea, the common property of all, acts as a safeguard against transgressions of the Law of Nations, and of which all Nations may partake. *

Decision of the Supreme Court of the U. S. of America, with regard to the right of approach.

The Supreme Court of the United States has decided that ships of war, acting under the authority of government to arrest pirates and other public offenders, may approach any vessel descried at sea for the purpose of ascertaining her real character. † But this right to approach does not extend, for non-belligerents, to the right of visitation and search, for the purpose of obtaining the custody of the offender, unless expressly permitted by international compact, as in the treaties for the suppression of the slave trade. ‡

* TWISS. I. § 170. ORTOLAN. Dipl. de la Mer. Liv. II. Chapt. XII. Du Droit d'Enquête du Pavillon en pleine mer.

† Case of the *Mariana Flora*, 11 Wheaton, 43.

‡ HALLECK. Intern. Law. Vol. I. Chapt. VII. PERELS. Internationales Seerecht. French translation of Mr. L. Arendt, Director at the Foreign Office, Bruxelles. Edit. 1883, § 12.

CHAPTER XIII.

PIRACY.

Definition of piracy.

§ 98. As stated above (§ 38, page 115), acts of piracy are considered, under the Law of Nations *(jure gentium)*, to be acts which are equally injurious to all nationalities and over which all States have a natural right of jurisdiction, irrespective of the persons by whom or the place where such acts of piracy may be committed, as this class of offenders against the Law of Nations do not possess any political nationality. With piracy, says Woolsey, the Law of Nations has to do as it is a crime, not against any particular State, but against all States and the established order of the world. Piracy is a robbery on the high-sea, committed by persons not holding a commission from, or at the time pertaining to, any established State. If the robbery is confined to the land, although committed by the crew of a vessel, *i.e.*, if it be committed within the territorial jurisdiction of any Nation, it would not be called *piracy*, and would come under the cognizance of the territorial laws alone. *

General character of piratical acts.

With respect to the general character of piratical acts, Mr. Woolsey makes the following statements. "Piracy is the act, (1.) of persons who form an organization for the purposes of plunder, or with malicious intent; but who, inasmuch as such a body is not constituted for political purposes, cannot be said to be a body politic; (2.) of persons who, having in defiance of

* WOOLSEY. Intern. Law. Edit. 1879, p. 242. DANA, on Wheaton's Elem. of Intern. Law, Note 83.

law seized possession of a chartered vessel, use it for the purpose of robbery; (3.) of persons taking a commission from two belligerent adversaries. The reason for ranking these latter among pirates is, that the *animus furandi* is shown by acting under two repugnant authorities. It has been held by some that a vessel which takes commissions even from two allies, is guilty of piracy, but others regard such an act only as illegal and irregular."

"On the other hand, it is not held to be piracy, if a privateer or other armed vessel, exceeding its commission, prey on commerce admitted by its sovereign to be friendly. Offences of this kind entitle the injured party to compensation, but the jurisdiction belongs to the vessel's sovereign, who is responsible for the conduct of his officer."

"Piracy being a crime against Nations, may be brought before any Court, no matter what the nationality of the plaintiff or the origin of the pirate may be. It is a natural although not a necessary consequence of this principle, that an acquittal by any Court in Christendom is an effectual bar against another trial for the same offence."

"As pirates acquire no title to what they take or recapture, it reverts to the proprietor without application of the rule of postliminy, but the re-captor can claim salvage."

"The punishment of piracy depends on the municipal law of the State where the offence is tried; the penalty commonly inflicted is death."

"The law of each State may enlarge the definition of the crime of piracy, but must confine the operation of the new definition to its own citizens and to foreigners on its own vessels. So, by treaty, two States may agree to regard as piracy a particular crime which is not classed

under international piracy. The effect of such a treaty is to give to both States jurisdiction for this crime over the citizens or subjects of both, but its operation has no bearing on other nations."

Opinion of Bynkershoek.

"In the time of Bynkershoek it was made a question whether the Barbary Powers were pirates, as earlier writers on the Law of Nations had pronounced them to be. He decides that they form States, and may be *justi hostes* in war; and that, in fact, Europe had acknowledged this by making treaties with them. No one now will question this, especially as in the course of time these States,—those of them which still exist,—have in a measure laid aside their piratical habits."

Are the crews of rebel vessels pirates.

"Could the crews of war-vessels, public or private, of a government, like the Confederated States, be regarded as pirates? This question came before our Courts, early in the war, in the case of the crew of the *Savannah* and one of the crew of the *Jeff Davis*. In the first case Judge Nelson instructed the jury that the offence committed by the said crew was not piracy according to the Law of Nations, for the captain's design was to prey on the commerce of the United States only, while piracy implies war against Nations in general. If piracy, it was such only by a law of the United States of the year 1820. But the commission given by the Confederate States could not be admitted as a defence, for the Courts could not recognize such an authority before the government had so done. Yet felonious intent is essential to robbery on land or sea; if this were wanting, the offen[illegible] could not be piracy under the statute w[illegible] defines it as committing robbery in or upo[illegible] ship, ship's lading, or company."

"In the case of the *Golden Rocket*, captured and burnt by the privateer *Sumter*, it was held (by the State and Circuit Courts), that the owner could not recover for the loss, under policies which insured against capture by pirates. For although the destruction of this vessel might be held to be a piratical act under the law of the United States, it would not be held to be such by the general Commercial Law of the world, which must be presumed to govern in the interpretation of the policy."

"These decisions are in conformity with the Law of Nations, and with our own declared views and claims under it. A privateer of an organized rebellious community, acting under letters-of-marque, given by the supreme authority, according to law, is not doing piratical work when, in a state of open war, it preys on the commerce of its enemy, although its government be as yet unrecognized. For, (1.) there is in this case no *animus furandi*; (2.) the commission is a special one against a particular enemy and not against mankind; (3.) and thus the captures made by such a vessel will not be noticed, by the Courts of neutral countries, as crimes against the Law of Nations. Accordingly, when Denmark delivered up to Great Britain three prizes, carried into a port of Norway by Paul Jones, in the Revolutionary War, we complained of it, and continued our reclamations through more than sixty years." *

The Peruvian Insurgent vessel Huascar.

A different principle was brought forward in the case of the Peruvian ship-of-war *Huascar*

* WOOLSEY. Intern. Law. Edit. 1879, p. 242, et seq. Compare DE MARTENS. Nouvelles causes célèbres. Vol. I. pp. 492–495. LAWRENCE'S WHEATON. French translation. Vol. I. pp. 176–179. Prof. BERNARD, of Oxford. British Neutrality, pp. 119–121. ORTOLAN. Diplom. de la Mer, Vol. I, Chapt. XI. p. 207, et seq.

which lost her nationality, by going over to the insurgents in 1877, under the following circumstances.

On the evening of May 6, 1877, the crew of a Peruvian ship of war, the *Huascar*, anchored in the bay of Callao, revolted and declared in favour of Don Nicolas Pierola. The captain and most of the officers were on shore at the time, and those who remained on board headed the mutiny. Several naval officers, both from shore and from other men-of-war took part in the movement, which was also aided by some civilians, friends to the cause of Señor Pierola. The vessel was immediately got under weigh, without any attempt apparently being made to detain her by the other men-of-war anchored near her, and she eventually got clear of the bay, and proceeded towards the south. Two days afterwards, the following decree was issued by the President of the Republic:—

Art. 1. Let the proper procedure be commenced against the authors and their accomplices who committed the crimes that took place on board the monitor *Huascar*, on the night of the 6th instant.

Art. 2. The Government declare that the Republic is not responsible for the acts of the rebels of whatsoever nature they may be.

Art. 3. The Government authorize the capture of the *Huascar*, and offer to recompense properly all those who, not belonging to the crews of the vessels forming the squadron of operation, shall bring her under the authority of the Government, or who may contribute to do so.

In the meantime the *Huascar* proceeded to Mollendo, where she boarded a British steamer, and demanded the official correspondence, which

was refused; whereupon the officer of the *Huascar* stated that he did not like to use force, as Señor Pierola was not yet on board, but that they soon expected orders to seize the mails when they thought proper to do so. A few days later, the *Huascar* stopped the British mail steamer from Liverpool, on the high seas, by firing a blank cartridge. On this occasion also the officers who boarded the steamer demanded the official correspondence, which was refused, and they retired without resorting to violence. Afterwards she stopped another British steamer, and took out of her by force Colonels Varela and Espiñosa, two Government officials, who were passengers, and who were going to Iquique on the Government service. Finally, Rear-Admiral de Horsey, the British Commander-in-Chief, received a telegram from Her Majesty's Consul at Arica, informing him that the *Huascar* had taken seven lighters of coals from an English vessel, without making any arrangements as to payment. Under these circumstances the Admiral considered it his duty, in view of the Peruvian Government decree, declaring that the Republic was not responsible for the actions of that vessel, to seize the *Huascar*, in order to put a stop to her proceedings against British interests; and he consequently proceeded to sea in H. M. S. *Shah* for that purpose. The *Huascar* having refused to obey his summons, the Admiral engaged her in Peruvian waters, off the town of Pacocha, and he also sent a torpedo expedition to blow her up; but this failed, owing to the *Huascar* having got away under cover of the night. After her engagement with, and escape from, the *Shah*, she appeared off Iquique with a flag of truce flying. The Peruvian squadron went out to meet her, and communication was estab-

lished. After much parleying, the *Huascar* surrendered, first making terms that everyone on board that ship, except Pierola himself, should be set at liberty. The Peruvian Republic complained to the British Government of the conduct of Rear-Admiral de Horsey, alleging that the *Huascar* did not, on account of having refused to recognize the authority of the Government of Peru, cease to belong to Peru; and that, although the supreme decree of May 8th was issued to bring about the apprehension of the *Huascar*, foreign ships-of-war were not thereby entitled to attack her, not only because International Law prohibited mixing in the internal affairs of other States, but also because the reward offered by the decree could not refer to the commanders of such ships without grossly offending their personal and national dignity. The British Government having required the opinion of its Law Officers on the subject, the latter reported that in their opinion the papers submitted to them showed that the *Huascar* had been taken out of the hands of her lawful officers; that the Peruvian Government had disavowed any liability for her acts; that she was consequently sailing under no *national* flag; and that no redress could be obtained for any acts which she might commit. Therefore, they were of opinion that in this state of things Admiral de Horsey was bound to act decisively for the protection of British subjects and property, and that the proceedings, resorted to, by him, were in law justifiable. Lord Derby approved of the Admiral putting a stop to the lawless proceedings of the *Huascar*, but, at the same time, expressed regret that he had not in the first instance endeavoured to obtain redress by means of remonstrance. *(See Parl. Papers*, 1877*)*.

On the question being brought before the House of Commons, the Attorney-General expressed his opinion that the *Huascar* was not a belligerent, but a rover committing depredations which made her an enemy of Her Britannic Majesty; and, therefore, it could not be disputed that the Admiral could wage war upon her. If she were a belligerent, or the vessel of a belligerent Power, to which the representative of the British Government was under an obligation to extend belligerent rights, the proceedings of the Admiral might be open to censure. But to make out that she was a vessel belonging to a belligerent power, there must be a rebellion; the rebels also, must have established something like a Government, to do certain acts upon the high seas against neutral ships. If a cruiser did commit acts of depredation without authority, the neutral States would demand satisfaction. If the *Huascar* were a belligerent, she would be responsible. In strictness the crew of the *Huascar* were pirates, and might have been treated as such; but it was one thing to say that, according to strict letter of the law, people have been guilty of acts of piracy, and another to advise that they should be tried for their lives and hanged at Newgate. The *Huascar* was called upon to surrender, and she refused. The Admiral took steps accordingly to make her surrender. *(H. of C. Debates*, 1877).*

* HALLECK. Intern. Law. Edit. Sherston Baker. Vol. I. p. 388.

CHAPTER XIV.

THE SLAVE TRADE.

Treaties for the suppression of slave trade.

§ 99. By the treaty of Paris of 20th November, 1815, Austria, France, Great Britain, Prussia and Russia entered into an international compact, on the principles proclaimed at the Congress of Vienna, to employ efficacious measures for the entire and definite abolition of the slave trade, which was declared highly objectionable to all religious and natural laws. At the Congress of Vienna in 1815, of Aix-la-Chapelle in 1818, and of Verona in 1822, the abolition of the slave trade was formally adopted as a principle of Public Law. *

Since these periods the principle has been carried into execution by special treaties between Great Britain and the different States of Christendom, both in the new and the old world and also with various heathen potentates in the southern coast of Africa. Many countries have stamped the character of piracy upon this horrible traffic, so far as the authority of their own Municipal Laws may extend. †

Treaty between England and France regarding rights of visit.

The question of the *right of visit*, which, as connected with the suppression of slave trade, was so long a matter of contention between Great Britain and France, and between the former and

* DE MARTENS et DE CUSSY. Recueil de Traités et de Conventions. Vol. V. p. 437. Traités des Noirs.

† A catalogue of these treaties between Great Britain and other States, up to 1850 is given in Phillimore's Comm. on Intern. Law. Vol. I. Edit. 1879. p. 420. See also DE MARTENS et DE CUSSY. Recueil de Traités et Conventions. Traités des Noirs. Vol. V. pp. 436–440.

the United States of America, has been settled by the treaty of May, 1845, with France and that of April, 1862, with America. As to the right of visit, the instructions of the French and British Governments, respectively given to their cruisers, were communicated by each Government to the other and annexed to the convention. Those instructions contained, among other things, the following rules with regard to the right of approach and visit issued by the British Admiralty.

Instructions to commanding Officers of Cruisers.

"You are not to capture, visit, or in any way interfere with vessels of France, and you will give strict instructions to the commanding officers of cruisers under your orders to abstain therefrom. At the same time you will remember, that the King of the French is far from claiming that the flag of France should give immunity to those who have no right to bear it, and that Great Britain will not allow vessels of other Nations to escape visit and examination by merely hoisting a French flag, or the flag of any other Nation, with which Great Britain has not by existing treaty the right of search. Accordingly, when, from intelligence which the officer commanding her Majesty's cruiser may have received, or from the manœuvres of the vessel, or other sufficient cause, he may have reason to believe that the vessel does not belong to the Nation indicated by her colours, he is, if the state of the weather will admit of it, to go ahead of the suspected vessel, after communicating his intention by hailing, and to drop a boat on board of her to ascertain her nationality, without causing her detention in the event of her really proving to be a vessel of the Nation the colours of which she has displayed, and therefore one which he is not authorized to search; but should the strength of the wind or other circumstance render such mode of visiting

the stranger impracticable, he is to require the suspecting vessel to be brought to, in order that her nationality may be ascertained, and he will be justified in enforcing it, if necessary, understanding always that he is not to resort to any coercive measure until every other shall have failed; and the officer who boards the stranger is to be instructed merely in the first instance to satisfy himself, by the vessel's papers or other proof, of her nationality, and, if she prove really to be a vessel of the Nation designated by her colours, and one which he is not authorized to search, he is to lose no time in quitting her, offering to note on the papers of the vessel the cause of his having suspected her nationality, as well as the number of minutes the vessel was detained (if detained at all) for the object in question; such notation to be signed by the boarding officer, specifying his rank and the name of her Majesty's cruiser, and whether the commander of the visited vessel consent to such notation of the vessel's papers or not (and it is not to be done without his consent): all the said particulars are to be immediately inserted in the log-book of her Majesty's cruiser, and a full and complete statement of the circumstances is to be sent, addressed to the Secretary of the Admiralty, by the first opportunity direct to England, and also a similar statement to you as senior officer on the station, to be forwarded by you to our secretary, accompanied by any remarks you may have reason to make thereon. The commanding officers of her Majesty's vessels must bear in mind that the duty of executing the instruction immediately preceding, must be discharged with great care and circumspection. For, if any injury be occasioned by examination without sufficient cause, or by the examination being improperly

conducted, compensation must be made to the party aggrieved; and the officer who may cause an examination to be made without sufficient cause, or who may conduct it improperly, will incur the displeasure of her Majesty's Government. Of course, in cases when the suspicion of the commander turns out to be well founded, and the vessel boarded proves, notwithstanding her colours, not to belong to the Nation designated by those colours, the commander of her Majesty's cruiser will deal with her as he would have been authorized and required to do had she not hoisted a false flag. *

Treaty between Great Britain and the United States settling the question of visit and search.

With regard to the treaty of April 7, 1862, between Great Britain and the United States of America, Mr. Dana makes the following observations.

"The right to detain, search, seize, and send in for adjudication, is confined to cruisers of either Power, expressly authorized for that purpose; and is to be exercised only over merchant vessels, and only within a distance of two hundred and twenty miles from the coast of Africa, and to the southward of thirty-two degrees north latitude, and within thirty leagues from the island of Cuba, and never within the territorial waters of either contracting Power. The right to visit is to be exercised, when there is reasonable ground to suspect a vessel of having been fitted out for, or engaged in, the trade. The only trade referred to is the slave trade upon the coast of Africa, or the African slave trade. To secure responsibility and freedom from vexation, special provisions are made as to exhibiting written authority, with names of the cruiser and her commander; entries in log-books;

* PHILLIMORE. Comm. Intern. Law, Vol. I. 1879, p. 416, et seq.

requiring the boarding officers and commanders of authorized cruisers to be of a certain rank in the navy; providing exchange of notifications between the two Powers of the names of vessels and commanders employed, and as to the course to be pursued in case of convoy etc.; and stipulating that each Power will make indemnification for losses to vessels arbitrarily and illegally detained. As to what shall constitute reasonable suspicion, certain articles or arrangements found on board are specified as authorizing a bringing in for adjudication, and as affording protection against claims for damages, and as *primâ facie* evidence of being in the trade, and as authorizing condemnation of the vessel, unless clear and incontrovertible evidence is adduced, that they were engaged in legal business. Mixed tribunals are constituted for adjudication upon the vessels, but persons are to be sent home to their respective jurisdictions to be tried. Vessels condemned by the tribunals are to be broken up, unless either Government takes them for its navy, at an appraisement; and the negroes found on board are to be delivered to the State whose cruiser made the capture, and to be by that State set free." *

Fugitive slaves.

§ 100. Another feature connected with the great question of the suppression of the slave-trade is that with regard to fugitive slaves. On this subject the Lords of the British Admiralty issued on December 5th, 1875, certain instructions, "for the guidance of the commanders of Her Majesty's ships in reference to the receipt of fugitive slaves," † the publication of which caused great sensation throughout that country. These instructions were construed, says Sir R. Phillimore,

* Dana's Wheaton, p. 203, note. United State's Laws XII, 279.

† See Report of the Commissioners on fugitive slaves, presented to Parliament, 1876, p. 13.

as generally curtailing and, in some respects, abolishing the protection of the British flag hitherto accorded to fugitive slaves. The Government, in consequence of the feeling excited against the instructions, issued a Commission, dated February 14th, 1876, to inquire into and report upon the nature and extent of such international obligations as are applicable to questions as to the reception of fugitive slaves by Her Majesty's ships in the territorial waters of foreign States, and into all instructions from time to time issued to the commanders of Her Majesty's ships relative thereto, and whether any engagements into which this country (Great Britain) has entered bear upon such questions; and whether, in case such obligations, instructions, or engagements shall appear to be at variance with the maintenance by Her Majesty's ships and officers, in whatever waters they may be, of the right of personal liberty, any and what steps should be taken to secure for them greater freedom of action.

Report of Commissioners on fugitive slaves.

The Commissioners having inquired into the law and practice of foreign countries as well as of England upon this subject, made an elaborate report, dated May 30th, 1876, at the close of which they expressed themselves as follows:—

"We have now stated what we believe will be the best course to promote the humane and enlightened policy which this country has consistently pursued, but it will be convenient to recapitulate the purport of our recommendations."

"I. While, on the one hand, naval officers should abstain from any active interference with slavery in countries where it is a legal institution, the commander of a ship of war should not be altogether prohibited from exercising his discretion as to retaining a fugitive slave on board his

vessel, whether such slave has come on board clandestinely or in any other way."

"II. The cases that present themselves to naval officers vary so much in character, that it would be inexpedient, even were it possible, to lay down any strict rules for their guidance under all the different circumstances which may occur."

"III. Ships of the Royal navy should not be made a general asylum for fugitive slaves; and the commander should, therefore, before retaining a slave on board, satisfy himself that there is some sufficient reason for so doing."

"Such reason (where there is no treaty authorizing the release of the slave) consisting not only in the desire of the slave to escape from slavery, but in some circumstance beyond this desire."

"IV. In dealing with this question the officer should be guided, before all things, by considerations of humanity. Whenever, in his judgment, humanity requires that the slave should be retained on board, as in cases where the slave has been, or is in danger of being, cruelly used, the officer should retain him. In other cases he should do so only where special reasons exist."

"V. When it appears that the fugitive has been newly reduced to slavery, or imported in violation of treaty engagements, or entitled to his freedom under the especial provisions of a treaty,—as under the treaty with Zanzibar of 1875,—he should always be retained."

"VI. If the delivery of a fugitive slave, whom the officer would otherwise have thought it right to retain, be claimed on the ground that he has committed a criminal offence, that is an offence for which he would equally have been punishable according to the local law if he had been a free

man, the officer ought, before complying with the request, to satisfy himself that the charge is not merely a colourable pretext for procuring the restitution of the slave, and also that the slave, if delivered up, will not be treated with inhumanity."

"VII. Where a slave has come on board under such circumstances as to give his master a right to expect that he will not be harboured there against the master's will, as in the case of slaves attending their masters on visits of ceremony, or entering a ship in order to coal her or with provisions for sale, the slave should not be retained unless his retention should appear to be demanded by strong reasons of humanity."

"VIII. In all cases where the officer decides that the fugitive should not be retained, he should not consider what course would be most for the interest of the slave himself: whether to put the slave on shore, or allow him to go ashore or deliver him over to the nearest British Diplomatic or Consular officer, or to the local authorities. But the officer should not compel the slave to leave the ship unless satisfied that such a measure would not lead to any ill-treatment of him on account of his attempt to escape."

"IX. Where facilities are available for communicating with any of Her Majesty's Diplomatic or Consular authorities, the officer should in all cases, without delay, inform such authority of the steps he has taken."

"We hope that the instructions which we have recommended to be given to our naval officers will, if carried into effect, tend to some mitigation of the cruelties of slavery which have been brought to our notice."

"It is obvious that the benefits to be derived from these recommendations will depend to some

extent upon the degree to which a similar policy may be adopted by other Nations. It is not within the scope of our duty to suggest the manner in which this result should be brought about, but we regard it as a matter of the first importance."

"It must be observed that the reception of fugitive slaves is only a small part of the great problem of slavery which this country earnestly desires to solve, and must be treated as subordinate to that greater purpose. For this end the British Government must, if the evidence which we have taken is to be trusted, enter into some arrangements with those Powers whose possessions are in the immediate neighbourhood of the slave-trading districts."

"If the Red Sea is to serve the purpose of the slave-dealer, and the hoisting of the Turkish or Egyptian flag is to protect this traffic, our efforts to abolish the slave trade must be ineffectual. So again in Portuguese waters, * we should seek to obtain the right of search, which under former treaties we possessed. It would also be desirable to obtain some modification of the treaty with Madagascar."

"Some of these matters are perhaps beyond the strict limits of the inquiry for which this Commission was appointed, but the release of a few fugitive slaves would have little effect on slavery or the slave trade, unless measures were also taken to block the larger channels through which the slave dealer can still conduct a lucrative trade in African captives."

"In concluding this report, we must express the great obligations under which we are to

* A Treaty between Great Britain and Portugal, making further provisions with regard to joint action to be taken for the suppression of the slave trade on the East coast of Africa and in the interior, was signed at Lisbon, in May 1879.

foreign Governments, as to your Majesty's officers, both at home and abroad, for the valuable assistance and information they have afforded us in our inquiry." The Commissioners, who signed the report, were Somerset, A. E. Cockburn, Robert Phillimore, * Montague Bernard, T. D. Archibald, Alfred H. Thesiger, H. T. Holland, L. G. Heath, S. H. Maine, J. F. Stephen, H. C. Rothery. Subsequently to the publication of this report the Lords of the Admiralty issued the following Circular.

"Admiralty, 16th August, 1879.

"*Receipt of Fugitive Slaves.*

Circular of the British Admiralty of August 16, 1879, with regard fugitive slaves.

"My Lords Commissioners of the Admiralty are pleased to direct, that the following instructions shall be considered as superseding all previous instructions, issued for the guidance of commanding officers of Her Majesty's ships, as to the receipt of fugitive slaves."

"These instructions are to be considered part of the General Slave Trade Instructions, and to be inserted at page 29 of that volume, in lieu of the Circular dated December 5, 1875, with the heading of 'Receipt of Fugitive Slaves,' but they are also intended for the guidance of commanding officers of Her Majesty's ships generally."

"1. In any case in which you have received a fugitive slave into your ship, and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender on the ground of slavery."

* Sir ROBERT PHILLIMORE. Agreed with the report except on one point, the last sentence of Section III.

"2. It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity, and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a State in which slavery exists; but, in the latter case, you ought, at the same time, to avoid conduct which may appear to be a breach of international comity and good faith."

"3. If any person, within territorial waters, claims your protection on the ground that he is kept in slavery, contrary to treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British Consular authority, and you should be guided in your subsequent proceedings by the result."

"4. A special report is to be made of every case of a fugitive slave received on board your ship." *

Municipal Legislation with regard to the suppression of Slave-trade. Grotius.

§ 101. The legislation and jurisdiction of a civilized State with regard to its external relations, of which we gave a sketch in paragraph 38, cannot be regarded as complete, without the necessary provisions in its Municipal Laws against the slave trade as well as against piracy. Viewing what is already accomplished, also in this branch of humanity, by impartial civilization, we may share with confidence the hope of Sir Robert Phillimore, "that before many more years have elapsed, both Municipal and International Law

* Sir ROBERT PHILLIMORE. Comm. Intern. Law. Vol. I. Edit. 1879. p. 441. et seq.

will be brought into harmony with the Law of Nature; and that, to the question of the abolition both of slavery and the slave trade, the emphatic language of Grotius may be applicable, *humano generi placuit.*" *

* L. II. C. X. § 1.

CHAPTER XV.

NATIONAL CHARACTER AND JURISDICTION OF VESSELS.

I.—*Nationality of Private or Merchant Vessels.*

Private or merchant vessels.

§ 102. The national character of a vessel is determined by the nationality of domicile of its owner (§ 40), under certain conditions which are imposed by the law of the State granting the right to use its national flag. Conditions of nationality in the case of sea-going private vessels have regard to the following four classes of details, viz.:—

1°. The construction or origin of the vessel; the question being, whether foreign-built vessels are admitted to the privilege of using the national flag of the State and, if so, under what conditions.

2°. The ownership; under which head the question arises whether the vessel must belong entirely to subjects or citizens of the State *(Staatsangehörigen)*, or whether aliens are allowed to have shares in the property and to what extent.

3°. Captain and officers. The question here is whether the captain and officers must all be nationals, or in how far foreigners are allowed to serve as captains or officers on board national vessels.

4°. The crew. The question here is whether the whole complement must consist of nationals, or what portion of the crew is allowed to be composed of foreigners.

The legislation regulating the conditions on which private vessels can obtain nationality, forms part of the Navigation Laws (Merchant Shipping Acts) of each State, and as it is of the utmost consequence to prove, at any time, the nationality of private vessels, the documents which serve to prove the right of a vessel to the nationality claimed, are also specified in these laws. Special legislation regulates the different modes of protection, given by each State to its national trade and navigation, whether in the shape of certain monopolies, rights, or advantages, or in the shape of exemption from or reduction of customs dues in general or with regard only to the transport of goods between the different ports of the State, the coast trade-navigation *(Cabotage)*. These national rights, when extended to foreigners, form the subject of commercial treaties between States, while these treaties are always based on the internal legislation of the States concerned and on the conditions under which vessels can obtain the respective nationality. Hence these acts of national legislation overlap the domain of the Law of Nations, constituting one of the principal subjects of Maritime International Law.

The national status of a ship remains attached to her, wherever she may be sailing or riding at anchor, as long as the conditions of her nationality are maintained in conformity with the respective law governing those conditions.

II.—*Outward Tokens of Nationality.*

Flag. Name. § 103. The ostensible token or badge of nationality is the flag *(pavillon, Flagge)* of the State to which the ship belongs, but which she is entitled to carry only as long as she complies

with the conditions under which the nationality is obtained. The outward means of identifying the ship are her name and place of registry painted on the outside of the hulk.

Private or merchant vessels are obliged to have their names painted conspicuously on both sides of the bow, and on the stern *(Heck)* the name and place of registry. The laws of some States prescribe also, besides the outward names, the marking of the vessel in-board, on the mainbeam *(Hauptbalken)*.

Some States have a special flag for their public vessels and fortresses, which is called the military flag *(Krieysflagge)* and is distinct from that allowed to the private or merchant vessels of their nationality.

Private vessels are not allowed to fly the pendant *(flamme, Wimpel)* which is the distinctive badge of the public vessels of the State. When merchant vessels are chartered by their Government for special services and have military officers or troops on board, or when they are commanded by naval officers, the pendant is shown as a token of their official character, when this is required to secure for them the privileges of a public vessel.

The right of approach, treated in paragraph 95, is exercised exclusively for the purpose of ascertaining the outward tokens of nationality noted in this section.

But the flag and other outward tokens are not sufficient to prove the nationality of a vessel. These apparent distinctions, which can easily be adopted and changed by any vessel, must be corroborated by more permanent proofs, which are noted in the next section.

III.—*Ship's papers.*

Ships papers. Papers carried by private vessels in evidence of their nationality and other documents to be kept on board.

§ 104. With regard to the national character of public vessels or vessels of war, we refer our readers to the next section. As to vessels owned by private individuals or corporations, which are termed private or merchant vessels, their nationality is not acknowledged unless the exhibition of the flag is supported by other proofs indicating that the ship in question has complied with all the conditions of nationality, as stipulated by the laws of the State to which she belongs. These proofs are furnished by documents, collectively called the ship's papers *(papiers de bord*, or *lettres de mer*, *Schiffs-papiere)*. These documents may be divided into the following four classes.

A. Documents which serve to identify the vessel and its nationality.

B. Documents referring to the ship's crew and passengers.

C. Documents indicating the intended voyage of the ship, the port last left and the port of destination.

D. Documents detailing the nature of the cargo carried by the ship.

A. The following ship's papers furnish evidence of nationality.

1°. The sea-brief *(patente de navigation*, *See-brief)* or certificate of registration *(acte de francisation ou titre de propriété*, *Schiffs-certificat)* in particular cases substituted by the sea-pass *(permis de navigation*, *Felaggenattest)* which is a provisional sailing licence, granted to a vessel, by the proper authority, for a definite short period, when registration *in formâ* cannot take place.

The sea-brief or certificate of registration, or the substituted sea-pass, contains the following items :—

a. Name of the vessel.

b. Description of rigging, stating whether the ship is propelled by sail or steam or both and specifying engine power where there are engines.

c. Amount of gross and net tonnage.

d. Port of registration *(Heimaths-hafen)*, date and number of registry.

e. Place and time of building the ship.

f. Names and domicile of owners, specifying also, where there are more owners than one, the share each owner has in the property of the vessel.

g. Description of the armament of the ship.

2°. The builders' certificate *(Acte de construction, Beilbrief)* or certificate of ownership.

3°. Certificate of measurement *(Messbrief)*.

B. The following documents furnish evidence with regard to the crew and passengers.

1°. The muster roll *(role d'équipage, Musterrolle)*.

2°. The shipping articles (often attached to the muster roll and forming one document with the same).

3°. List of passengers.

4°. Bill of health.

C. The following documents serve to verify the nature of the cargo.

1°. Bills of lading *(connaissement)*.

2°. Manifests of customs clearance.

3°. Consular manifests or declaration.

D. The following documents furnish the evidence required as to the voyage intended.

1°. The ship's log-book *(Journal)*.

2°. The charter-party *(charter-partie)*, if the vessel has been chartered.

3°. The certificate and visa of the respective Consulates on the certificate of registry (Sea-brief).

4°. Cockets or custom-house clearances.

The verification of the documents enumerated in this section is the object of the right of visit and search, as exercised by belligerents, for the determination of a vessel's nationality.

IV.—*Public Vessels.*

Public vessels. Vessels of War.

§ 105. Under the denomination of *public vessels* are comprised all vessels in the service of a State, whether they be the actual property of such State or merely hired for public purposes, whether they be armed for war (in which case they are more particularly called vessels of war), or equipped as Government transports or store ships, yachts, avisos, tenders, or hospital ships. No other condition is required to constitute the public character of a ship except that she be *bonâ fide* commissioned by the State and commanded and manned by officers and men in the regular service of their own Government.

Tokens of the nationality, attaching to the public vessels of a State, consist in the national military flag and the pendant which such vessels carry and in verification of which a declaration may be required of the Commanding Officer, if necessary, to be solemnly given in writing or by word of honour, or he may produce his commission, orders or instructions.

Besides the flag and pendant and certain peculiar outward appearances which distinguish public vessels generally (and especially the war vessels of the present time) and in which the

experienced eye of the mariner will seldom be mistaken, the series of outward tokens verifying the public character of a vessel may be completed at sea by the discharge of one or more guns. *

The public vessels of a friendly power are tacitly considered to have, in time of peace, admittance to all ports, even those closed to foreign trade and commercial navigation, unless it be otherwise stipulated by treaty for political reasons, or when a port in rebellion is declared blockaded by the sovereign Government of the respective State. In some particular instances also the admittance of foreign vessels of war may be refused,—on the ground of the absence of previous communication made within proper time,—for temporary reasons in a particular port, where their appearance, for some reason or other, may, at a critical moment or period of public affairs, cause serious local disturbances. In such cases the local authorities give their reasons for the refusal of admittance, which are always respected by the commanding officers of a friendly Power. †

Vessels equipped as Royal yachts, transports, troop-ships or hospital ships, and other vessels equipped and commissioned by the Government of a State for any kind of public services, enjoy all the immunities of a public vessel, and are placed on the same footing as a vessel of war equipped for purely military or naval service.

All public vessels of a sovereign State enjoy, whilst in foreign territorial waters, exemption from the local jurisdiction, so far as the vessel, the captain and officers and all persons belonging

* "It is important to observe that, if any question arise as to the nationality of a ship of war, the commission is held to supply adequate proof." PHILLIMORE. Com. Int. Law. Vol. I. Edit. 1879, p. 482. ORTOLAN. Diplom. de la Mer. Edit. 1864, Vol. I. p. 141 and 181, et seq. HALL. Int. Law. Edit. 1880, p. 132.

† ORTOLAN. Regl. Intern. Vol. I. Liv. II. Chapts. VIII–X.

to the crew and the passengers are concerned who embarked on board the vessel in the national waters of the vessel or in the waters of a third State.

Public vessels are also exempt from the supervision of custom-house officials on board, from entrance or clearance certificates, and from all duties, dues and tolls *(peage)* which serve directly to make up the fiscal revenue of the State.

Public vessels are also exempt from all forms of process in private suits or claims before any foreign tribunal.

With respect to their national character and prerogatives, the public vessels of a friendly Power, when within the territorial waters of a State, are entitled to be treated in accordance with all the rules of courtesy and etiquette which are customary among civilized Nations in the due observance of the principles of maritime ceremonial.

What is due with regard to the national character of a public vessel, is likewise applicable to her boats, cutters, tenders and crew.

Vessels of recognized yacht-clubs.

§ 106. Yachts belonging to organized national yacht clubs, provided that the statutes of the club have been recognized by the respective Government and brought under the cognizance of the different maritime Powers, are regarded as privileged vessels, being in some respects assimilated with public vessels. When arriving in foreign territorial waters, such yachts are treated by the naval authorities with the outward tokens of regard due to public vessels, but without firing of salutes. They are also exempt from custom house charges and from supervision of customs-officers on board ship.

Privileges of public vessels in foreign territorial waters.

§ 107. The exemptions, immunities and privileges above stated, granted to the public vessels of an independent State, and which have been wrongly ascribed to the fiction of extra-territoriality (comp. § 105), are conceded to public vessels by virtue of their being, to a certain extent, regarded as representing the sovereign Power of the State. In other words, the concession is due to the respect which the sovereignty of a friendly State can claim. Thus, reciprocally, when any public vessel is within the territorial waters of a foreign sovereign State, the relations which mutually exist between independent States must always be maintained by such public vessel belonging to a friendly Power. These relations, which in no circumstances can be ignored, entail some exceptions from the general rule of immunity due to public vessels, in which the local laws prevail. In these cases, to avoid conflict of jurisdiction, when applying the local laws, the concurrence of the State to which the public vessel in question belongs, is expressedly or tacitly implied, and such jurisdiction is therefore called concurrent, as noted in paragraph 49. These cases will be dealt with in paragraphs 110 and 111.

V.—*The International Status of Public and Private Vessels compared.*

Essential distinction between public or State vessels and private vessels, with regard to national jurisdiction and international status.

§ 108. Public and private vessels are, when on the high seas, that is to say outside the territorial limits of any State, subject to the jurisdiction of the State whose political nationality they share. With regard to the continuation of this national jurisdiction outside the limits of the respective State, there is an essential distinction to be observed between public or war vessels and private or merchant vessels.

With regard to the jurisdiction of public and private vessels, Mr. Woolsey, combining the opinions of modern writers in his plain clear and concise manner, makes the following remarks. "Vessels belonging to the citizens of Nations, on the high seas, and public vessels, wherever found, have some of the attributes of territory. In regard, however, of the territorial character of vessels, it is necessary to be more definite, for, if they have this property, in some respects but not in all, only false and illogical deductions can be drawn from an unqualified statement. Is it true then that they are identical in their properties with territories? If a ship is confiscated on account of piracy or of violation of custom-house laws in a foreign port, or is there attached by the owner's creditor and becomes his property, we never think that territory has been taken away. For a crime committed in port, a vessel may be chased into the high seas and there arrested, without a suspicion that territorial rights have been violated, while to chase a criminal across the borders is a gross offence against sovereignty. Again, a private vessel when it arrives in a foreign port, ceases to be regarded as territory, unless treaty provides otherwise, and then becomes merely the property of aliens. If injury is done to it, it is an injury which indirectly affects the sovereign of the alien, whereas injuries to territory, properly so-called, affect the public power in an immediate manner. It is unsafe, then, to argue on the assumption that ships are altogether territory, as will appear, perhaps, when we come to consider the laws of maritime warfare. On the other hand, private ships have certain qualities resembling those of territory. (1) As against their crews on the high seas; for the territorial or municipal law accompanies them as

long as they are beyond the reach of other law, or until they come within the bounds of some other jurisdiction. (2) As against foreigners, who are excluded on the high seas from any act of sovereignty over them, just as if they were a part of the soil of their country. Public vessels stand on higher ground: they are not only public property, built or bought by the Government, but they are, as it were, floating barracks, a part of the public organism, and represent the national dignity, and on these accounts, even in foreign ports, are exempt from the local jurisdiction. In both cases, however, it is on account of the crew, rather than of the ship itself, that they have any territorial quality. Take the crew away, let the abandoned hulk be met at sea: it now becomes property, and nothing more." *

Distinction between the respective characters of public and private vessels.

§ 109. The combined power and organisation which constitute the movable body, called a vessel of war, or any other vessel in the actual service of a State, is rightly regarded to represent, through its officers and crew, the State to which the vessel belongs. This principle can safely be maintained on the ground that the public vessels or war vessels of a State are under the direct control of officers properly educated and trained for the performance of their various duties, which qualify them to be entrusted, under the responsibility of their Government, with the administration of the laws of the State, in all circumstances and places, wherever they may be outside their national waters. But this is far from being the case with private or merchant vessels, which have such a variety of organisation in the composition of its staff of officers and crew, that sometimes not even the

* WOOLSEY. Intern. Law. Edit. 1879. § 58. Edit. 1879. p. 72, et seq.

captain is required to be a subject of the State whose flag he is carrying over the sea. A Government, therefore, cannot possibly take the responsibility of entrusting these combinations of private individuals of different nationalities,—over which it has no direct control, no choice of individuals, no right of nomination, appointment or dismissal, and no instructions or orders to give, —with the administration of the laws of the State or with the slightest judicial power beyond what is strictly necessary to maintain professional discipline on board among the crew and passengers, when out of the jurisdiction of the State or its Consular officers.

As the State is bound to protect its subjects and their properties, wherever contained or invested in vessels of its nationality, the administrative and judicial power, which on the public vessels of the State are entrusted to the captain and the officers, as the representative agents of the State, are, with regard to private vessels entrusted to the Government's Consular officers, the representatives of the State abroad, in every foreign port where a private vessel is likely to arrive. From this state of affairs has originated that branch of the office of the Consul, which is called Consular jurisdiction.

It is thus only out of sheer necessity that, during the passage from one port to the other, the administrative and judicial powers, (under control of the Consuls and other territorial authorities), are entrusted to the masters and officers of private vessels, with injunctions to report all cases occurring during the passage, as soon as possible to the respective Consular officer abroad, on arrival in the first port where such Consulate is established, or to the territorial authorities

when arriving in any port or waters belonging to the vessel's national State jurisdiction. Under the same authority the master of a private vessel is also competent to register in the log-book any births and deaths, occurring during a passage on board ship while at sea, and to hand over to his Consul, certificates or copies of such registration on arrival in the first port where such a representative of his Government is stationed. Such is likewise the case with regard to wills made at sea on board a private vessel. All these functions of the master cease the moment he arrives within the jurisdiction of any State whatever, when the registering of births or deaths or the drawing up of any document concerning a will must be done by the Consular officers or by the local authorities, in conformity with local usages or treaties.

It is therefore universally acknowledged, that, as a rule, private vessels entering the territorial waters of a foreign State, are, with their crew and passengers, in all cases not belonging, exclusively, to the internal discipline of the vessel, subject to the jurisdiction of that State, whose laws are applicable to all circumstances and cases in which it is not otherwise stipulated in treaties of commerce or Consular conventions.

When the jurisdiction is regulated by convention, it is generally done on the principle that exemption from foreign jurisdiction is limited to acts committed within ship-board, that is to say to offences against the regulations of the vessel's internal or professional discipline and to offences committed by any member of the crew against another person belonging to the same vessel. Thus with regard to private or merchant vessels, whilst within the territorial waters of a foreign State, the privilege of exterritoriality cannot be

claimed under any circumstances. The exemptions granted as above stated, by comity or convention, are limited to cases of a purely domestic character, that is to cases concerning only the members of one and the same ship's company and occurring within ship-board, unconnected with any conflict with the local police. In the case of any offence committed, be it on board ship or on shore, by a member of a ship's company against any person not belonging to the same ship, and generally in the case of any conflict occurring between the ship's crew on shore or outside their vessel, and finally in all cases in which the public peace of the place or harbour is disturbed or assistance from local authorities has been solicited by the parties interested, the territorial jurisdiction follows its natural course and has full authority. In such cases the local authorities have the right to arrest persons on board ship, to take any member of the crew into custody on shore, or to institute legal investigations on board ship. This is, however, invariably done with the concurrence of the respective Consular officer. Hence it follows that local jurisdiction extends to all offences committed on board a ship, by or against any person not belonging to the same crew. An offence committed on board a ship against a member of the crew of another vessel belonging to the same nationality, can likewise not be regarded as a domestic affair, within ship-board, because it is to the vessel and not to the Nation at large to which the exemption in question is granted, unless the wording of the respective convention contain a contrary stipulation; but even then the occurrence must have taken place on board one of the vessels implicated, for all offences committed outside ship-board belong to the local jurisdiction.

Acts committed on the high sea on board private vessels.

It follows from the principle that every vessel on the open sea is subject to the laws and jurisdiction of its own State, that acts committed on board a private or merchant vessel on the open sea cannot be brought under the jurisdiction of a foreign State in whose port the vessel may subsequently arrive. This general rule does not exclude Concurrent Jurisdiction in some particular cases, as stated in § 49, sub-section 3°.

Actions arising from collision and salvage claims, with regard to private vessels and with regard to public vessels.

Actions arising from collision and salvage claims, are subject to the laws of the place where the vessel is found. Private vessels are liable to arrest and detention for any transgression of fiscal laws, for non-payment of salvage dues and in case of other direct claims *ad rem*.

Public vessels are, by virtue of their character, exempt from all local jurisdiction, also with regard to actions brought regarding collision and salvage claims. Any such claim must be examined and decided by the representative of the foreign State to which the Public vessel belongs. (comp. paragraphs 77 and 78).

Obligations of foreign vessels in the territorial waters of a friendly State.

With regard to the responsibility of foreign vessels in the territorial waters, of a friendly State, Wheaton makes the following statements. "Whatever may be the nature and extent of the exemption of the public or private vessel of one State from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify any act of hostility committed by such vessels, her officers and crew, in violation of the laws of Nations, against the security of the State in whose ports she is received or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require." *

* WHEATON. Elem. Intern. Law. Edit. Dana, 1866, § 104.

Mail boats. (Paquebots-poste.)

Mail boats (Paquebots-poste), being vessels belonging to Navigation Companies which possess an organized service, sanctioned by their Government, for the regular conveyance of the mails of the Government's postal service, enjoy some of the immunities of public vessels. This privilege is granted to enable them to keep up the regular mail-service which they contracted to keep up under the direct control of their respective States. These immunities have regard to exemption from arrest or detention of the vessel and to other facilities granted, especially with regard to fiscal matters, by treaties or postal conventions. In all other respects mail-boats have no more privileges than any other private or merchant vessel, to which class they belong unless it be expressly stipulated otherwise by treaty.

Private vessels subject to local jurisdiction in foreign territorial waters.

It is obvious from the foregoing remarks, that private vessels cannot possibly be regarded as State territory, in any sense of the word. A State is by no means responsible for acts of hostility committed against another State or vessel, on the open ocean or in any territorial waters, by a private vessel flying the national flag of the State. Such responsibility, however, attaches to its full extent to any State with respect to acts committed by its public vessels. The latter only are considered as State property. The moment a private vessel enters the territorial waters of another State, she becomes subject to the local jurisdiction in all cases concerning the interest or the laws of the place. When such a ship, after having committed an offence against any of these laws, is pursued in territorial waters and seeks the refuge of the open sea, she may be brought back thence to answer the charges brought against her or the culprit may be arrested on board. In the case of damages or

redress being claimed for wrongful acts, committed by a merchant vessel or persons on board her, against private foreign individuals, liability attaches to the vessel, wherever she be found within any territorial waters, or to the persons responsible for the acts in litigation, in conformity with the respective municipal law. * Although the flag of a friendly State, which covers every private or merchant vessel belonging to that State, must always be respected, such private vessel cannot be regarded as entitled to the same immunities which are granted to the public vessels of the State. Mr. Ortolan maintains, with regard to the jurisdiction of private vessels in foreign territorial waters, the following propositions.

Ortolan's opinion with regard to the juridical character of private vessels.

"Quant aux navires de commerce, leur condition n'est pas la même. La question des autorités de police ou de juridiction compétentes pour la répression des crimes ou des délits commis à bord de ces navires, dans un port étranger ou dans une rade étrangère, n'est pas aussi simple ni aussi unanimement résolue."

"Nous savons, par les explications déjà données au chapitre X, page 204, que la situation de ces navires est mixte; que le bénéfice de l'exterritorialité doit s'y appliquer pour certains faits, et ne pas s'y appliquer pour d'autres. De là des distinctions qui ne sont pas nettement posées par les écrivains publicistes, que la coutume et les traités n'ont pas arrêtées partout d'une manière bien précise, et sur lesquelles par conséquent, les esprits ne sont pas tous d'accord."

"M. Wheaton, dans son traité de droit international, d'accord en cela avec d'autres écrivains, formule le principe général, que: Les bâtiments marchands d'un État quelconque, entrés dans les ports d'un autre État, ne sont pas exempts de la juridiction locale, à moins d'une convention expresse; et qu'ils le sont seulement en ce qui à été prévu par une telle convention." †

* HALL. Intern. Law. Edit. 1880. p. 214, § 80. WOOLSEY. Int. Law. Edit. 1879. § 58.

† The principle put forward by Sir ROBERT PHILLIMORE is as follows:—"With respect to merchant or private vessels, the general rule of Law is, that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, territorial waters (mer littorale), in which they lie." PHILLIMORE. Com. Int. Law. Vol. I. Edit. 1879. p. 483.

"Suivant la doctrine française, cette proposition est trop absolue et susceptible de quelques restrictions."

"Voici comment, en France, à défaut de convention speciale, est entendue et pratiquée la règle de droit international sur cette matière."

"Notre législation établit, quant aux faits qui se passent à board des navires de commerce, dans un port ou dans une rade en pays étranger, une distinction entre:—1°, d'une part, les actes de pure discipline intérieure du navire; ou même les crimes ou délits communs commis par un homme de l'équipage contre un autre homme du même équipage, lorsque la tranquillité du port n'en est pas compromise;—et 2°, d'autre part, les crimes ou délits commis, même à bord, contre des personnes étrangères á l'équipage ou par tout autre que par un homme de l'équipage; ou même ceux commis par les gens de l'équipage entre eux, si la tranquillité du port en est compromise."

"A l'égard des faits de la première classe, notre législation déclare que les droits de la puissance à laquelle appartient le navire doivent être respectés; que l'autorité locale, par consequent, ne doit pas s'ingérer dans ces faits, a moins que son secours ne soit réclamé. Ces faits restent donc sous la police et sous la juridiction de l'État auquel appartient le navire."

"Quant aux faits de la seconde classe, notre législation pose le principe que la protection accordée aux navires dans les ports français ne saurait dessaisir la juridiction territoriale pour tout ce qui touche aux intérêts de l'État; qu'ainsi le navire admis dans un port de l'État, est de plein droit soumis aux lois de police du lieu où il est reçu; et que les gens de son équipage sont justiciables des tribunaux du pays pour les délits commis même à bord contre des personnes étrangères à l'équipage, ainsi que pour les conventions civiles qu'ils pourraient faire avec elles; que notre juridiction pénale est applicable aussi aux crimes ou délits entre gens de l'équipage seuls, lorsque le secours de nos autorités est réclamé ou lorsque la tranquillité du port s'est trouvée compromise; en un mot que la juridiction territoriale, pour cette seconde classe de faits, est hors de doute."

"C'est d'après ces principes que nos autorités et nos juridictions se conduisent en France à l'égard des navires merchands étrangers mouillés dans nos eaux." *

The American Chief Justice Marshall has given the following opinion:—

* ORTOLAN. Dipl. de la Mer. Edit. 1864. Vol. I. p. 269. et seq.

Chief Justice Marshall's opinion.

When private individuals of one Nation commingle with those of another, as business or caprice may direct, promiscuously dwelling and dealing with the inhabitants of another country, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continued infraction and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects, thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, whilst there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, there is not one motive requiring such exemption. The implied licence, therefore, under which they enter, can never be construed to grant such exemption. *

Mr. Hall's opinion.

With regard to the limits of the jurisdiction of a State over its merchant vessels, outside its domain or territorial waters, Mr. Hall makes the following statements.

"Putting aside the fiction of territoriality as untenable, it may be taken for granted, that the jurisdiction exercised by a State over its merchant vessels upon the ocean is conceded to it in virtue of its owner-ship of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains, therefore, to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide

* The Exchange v. McFaddon, 7 Cranch (American) Rep. p. 144.

for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise. Its extent may be defined as follows. A State has:—

1. "Administrative and criminal jurisdiction so as to bring all acts, cognizable under these heads whether done by subjects or foreigners, under the disciplinary authority established in virtue of State control on board the ship and under the authority of the State tribunals."

2. "Full civil jurisdiction over subjects on board, and civil jurisdiction over foreigners, to the extent and for the purposes that it is exercised over them on the soil of the State, unless partial exemption is given to them when on board ship by the municipal laws of the State."

3. "Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other Powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain, or, finally, escapes into *non-territorial* waters after committing, or after some one on board has committed, an infraction of the law of a foreign country within the territory of the latter." *

VI.—*Concurrent Jurisdiction over Foreign Private Vessels in Territorial Waters.*

Concurrent Consular jurisdiction.

§ 110. The attributes and exercise of control, in matters of police and internal discipline, concerning foreign private vessels in the territorial waters of a State, belong to the accredited Consular officer of the Nation concerned, always provided that there be no infringement of the general territorial right of jurisdiction and police belonging to the local authorities, and that all

* W. H. HALL. Intern. Law. Edit. 1880. p. 212.

proceedings be taken in conformity with treaty rights, usage and reciprocity principles. *

The principle of concurrent jurisdiction requires that, when local authorities have, in the exercise of their right of jurisdiction or police, occasion to search a private vessel, they give previous notice of the case to the Consul of the Nation concerned, or, in the absence of a Consul, to the captain or senior officer of any public vessel of the same Nation that may be at the time in the waters of the said authorities. †

It is a general principle of Consular attributes, that foreign Consular officers, accredited within the territory of a State, exercise jurisdiction regarding questions of wages, regarding the shipping and discharging of seamen and in cases of transactions and delicts occurring on board vessels of the respective Consul's nationality within the territorial waters of his sphere of office, so far as they concern only the vessels of his nationality and their cargoes or the persons belonging to the crew or passengers of the respective vessel. If any such case concerns the public peace of the country or the rights of persons not belonging to the crew or passengers of the vessel in question, the case is subject to local jurisdiction. But when persons coming under the jurisdiction of the Consul happen to be citizens or subjects of the State from which the respective foreign Consul has received his exequatur, there is occasion for concurrent jurisdiction, as noted in section 49, sub-section 3. Concurrent jurisdiction occurs likewise also in those cases in which a Consul, or, by reason of the absence of this official, the captain or master of a foreign vessel

* ORTOLAN. Dipl. de la Mer. Edit. 1864. p. 277. Avis du Consul d'Etât du 20 November, 1806.

† *Idem*. Vol. I. Liv. II. Chapt. XIII.

appeals to the local authorities for assistance to detain delinquents of the vessel, to arrest deserters etc., as stated before in section 44.

Consular protection.

§ 111. The attributes of the Consul include the jurisdiction which he exercises with regard to individuals of foreign nationalities on board private vessels of the Consul's nationality. Such jurisdiction is also exercised in cases of exterritoriality or capitulation. A treaty of exterritoriality or capitulation includes not alone the subjects or citizens of the Treaty Power, but also those individuals of different nationality who are temporarily or permanently under the jurisdiction or protection of the Treaty Power, whether on board the vessels of such Power or registered at its Consulates, and this independently of the condition in which the State or Nation, to which the protected individuals respectively belong, may be with regard to such exterritoriality or capitulation. The same principle governs the case of a foreigner, who belongs to a Nation in enmity or at war with the country where he arrives in a vessel or under protection of a third friendly Power, provided the Power concerned be entirely responsible for the protected individual and the latter be regarded as under its actual jurisdiction.

VII.—*Droit d'Asile and Extradition with regard to Vessels in Territorial Waters, in Time of Peace.*

General remarks.

§ 112. We have already noted that the territorial jurisdiction of a State is not limited to the *terra firma* and inland waters, but extends to its closed bays and estuaries and the sea which washes its shores, the only limit being the range of its actual coast defences or a distance of three

marine miles (one league) from any part of the territory of the State, or in other words the territorial waters. Hence this extended jurisdiction is termed marine territorial jurisdiction (§ 90).

On the other hand, we have also noted that the State has in the case of these waters no right of property or exclusive domain, and cannot impede in time of peace the innocent navigation of the same by friendly vessels.

From the sovereignty rights of self-preservation and defence devolves, however, the right of empire or control and supervision, by means of legislation and jurisdiction. This right is indispensable to the State for the proper protection of its territories, harbours, coasts and littoral seas. * As noted also in paragraph 108, all vessels, without distinction of class or nationality, are, when on the *open sea*, subject to the laws and jurisdiction of their own State.

With regard to the jurisdiction of foreign vessels in the territorial waters of a State, there is a clear distinction made, as we have seen above (§§ 108 & 109), between public or war vessels and private or merchant vessels. The former remain entirely exempt from foreign jurisdiction, while the latter are exempt only in so far as admitted by international comity or stipulations made by treaties of commerce and Consular conventions (§§ 108–111).

We proceed now to refer to the peculiar contingencies arising in the case of vessels entering accidentally into territorial waters, under circumstances deviating from the normal rules above stated.

* ORTOLAN. Dipl. de la Mer. Liv. II. Chapt. 8. HALLECK. Edit. Sherston Baker. Vol. I. § 138. pp. 176–190.

Inviolability of territorial waters by foreign revenue cruisers.

§ 113. The general principle of the inviolability of territorial waters is uniformly maintained in time of peace as well as in time of war. As in time of war belligerents must respect the territorial waters of neutral States and their right of asylum, thus also, quite apart from the international rules of war, (which form the subject matter of Part V.), the territorial waters of a sovereign State constitute a safe refuge to all vessels of acknowledged nationality and employed in legal trade, and thus must, as a rule, serve as a bar against all proceedings on the part of foreign customs cruisers. As stated before (§ 94), when a private vessel, having been engaged in unlawful commerce or having violated the revenue laws of any State while being in territorial waters, attempts then, to escape the legal consequences of such action by leaving the port or roadstead in a clandestine manner, the State concerned has a perfect right to chase such vessel, of whatever nationality she may be, even to the open sea and then and there to execute the search and arrest, which flight had prevented before; always provided that *the special object be to execute the revenue laws of the State concerned.* * This right ceases, however, the moment such chased vessel enters the territorial waters of a foreign State, when it merges into the right of

* WOOLSEY. § 212. HALL. Intern. Law. Edit. 1880, p. 213. ORTOLAN. Dipl. de la Mer. Edit. 1864, p. 271. "The rights of independence and self-preservation have been judicially considered to justify a nation extending, in time of peace, the limits of absolute property and jurisdiction, fixed for her territorial waters, by preventing her revenue laws being evaded by foreigners beyond this exact limit. Both Great Britain and the United States of America have provided by their municipal laws against frauds being practised against their revenues, by prohibiting the trans-shipment of foreign goods within the distance of four leagues from the coast, and have exercised jurisdiction for this purpose in time of peace. These enactments are called the *Hovering Acts*. By 9. George III. c. 35, it is forbidden to tranship foreign goods *within four leagues* from the coast without payment of duties. The American Act of Congress, 1799. March 2. §§ 25, 26,

asylum to be claimed of this latter, which right must, of course, be respected by the pursuer, and the question becomes then, with regard to all individuals on board the chased vessel, one of *extradition*, as described in section 44.

The only exception, which this rule would admit, may be based on the exceptional situation of affairs created between States with conterminal territorial waters, when the chase, begun in the waters of the one, is uninterruptedly continued into that of the other State; for it is then a matter of that mutual security which is absolutely necessary and which renders the concessions to be made in such a case reciprocally benificial. *Exception to this rule.*

§ 114. The question above stated assumes a different aspect if a revenue cruiser *(guarda-costa)* or any other public vessel of a friendly State, after having arrested a vessel, for violating its revenue laws, arrives within the harbour, roadstead, or, in general, within the territorial waters subject to the jurisdiction of a foreign State, whether voluntarily or compelled by stress of weather or other *vis major*, and the captor claims the right of asylum in behalf of himself and his prisoners. Cases of this nature may occur under the following qualifying circumstances, viz.:— *Asylum claimed by revenue cruisers (guarda costa) with vessel in custody.*

A. Both the revenue cruiser and the vessel in her custody belong to the same nationality.

In this case, and provided the arrest has taken place outside the territorial waters, the State

27 & 99, contains the same prohibition, and their Supreme Court has declared this regulation to be founded on International Law. *Church v. Hubbards*, 2 *Cranch Reports*, p. 187. *Waite's American State Papers*, 1–75. See also above paragraph 89, as to the *King's Chambers*. The present English law on the subject is contained in the Customs Consolidation Act, 1876, 39 and 40 Vict. c. 36, §§ 53, 134, 138, 147, 179, 181, 182, 189 & 229. PHILLIMORE. Com. Intern. Law. Vol. I. Edit. 1879, page 275.

grants complete protection to the arresting vessel with all her dependencies, and the arrested vessel is then regarded as forming part of the foreign public vessel of the same nationality, thus barring all interference of foreign jurisdiction. If, however, the arrest has taken place in violation of the sovereignty right of exclusive jurisdiction over territorial waters, the arrest is void *per se*, and the arrested vessel has not lost the individual status attached to her as a private vessel under the flag of a friendly State, but she retains, as completely as the arresting cruiser, an individual claim to the right of asylum to be granted by the foreign State under whose protection she places herself. This claim is based on the same principle as that applicable to the case of any individual taking refuge in the territory of a foreign State, while at the same time the rules regarding extradition (§ 44), are, in all their bearings, taken into consideration in the decision of the case.

B. The arrested vessel belongs to the nationality of the State in whose territorial waters the foreign arresting revenue cruiser or public vessel takes refuge with her prisoner.

In this case the local Government takes, at once, the arrested national vessel into its own provisional charge, and the foreign cruiser is bound to comply with the summons of the local authority to deliver up the arrested vessel with her cargo and all the papers taken on board. The case is then decided in conformity with the stipulations of existing treaties, by the rules of municipal laws, or in pursuance of the instructions of the respective central Government.* In no case whatever can the natural claim on the hos-

* The rules laid down by the Lords of the British Admiralty, in October 1876, with instruction to be followed by British authorities, in reference to vessels arrested by foreign revenue cruisers, are as follow:—

pitality or comity existing between friendly States be stretched to that extent as to expect any State to tolerate the subjection of the property of its own subjects or citizens to foreign custody within its own jurisdiction. The foreign captor, whatever rights he possessed outside the limits of such jurisdiction, is bound to respect, first of all, the sovereignty rights of the State within whose waters he takes refuge, as this is the first condition on which his claim for asylum or protection is based.

C. The arrested vessel belongs to the nationality of a third friendly Power.

This case is treated in the same manner as the preceding case, but with this distinction, that the local Government does not take any action in the matter, unless interference is duly requested by the Consul of the nationality to which the arrested vessel belongs or by others who are directly and materially concerned in the vessel in question, as agents, consignees, creditors, and the like.

In the three cases above mentioned it is understood, that the arrested vessel has not been legally condemned by the competent tribunal and is consequently, as yet, in full possession of her nationality. Although the arresting revenue cruiser may have taken all the ship's papers and even the crew from the arrested vessel, the captor is not, by any means, authorized to change

(1.) In British waters, if a vessel of any nationality is wrongfully captured, she may be recaptured within such waters, and the capturing vessel may be lawfully detained.

(2.) If a British vessel is wrongfully captured on the high seas, she may be recaptured there; but a foreign vessel, if wrongfully captured in British waters, cannot be lawfully recaptured on the high seas.

(3.) In foreign waters no vessel, British or foreign, though wrongfully captured, can be lawfully recaptured.

(4.) The capturing vessel cannot lawfully be detained outside British waters.

the flag of the vessel in his custody. The nationality of the arrested vessel cannot be considered as lost until a condemnation by the proper legal authorities has actually taken place.

When a foreign vessel, having been legally seized within the territorial waters of a State, or if she, after being chased to the open sea, (as noted in § 94), by a revenue cruiser or public vessel on account of an alleged violation of municipal laws, be legally condemned to confiscation by the competent tribunal, the condemned vessel loses her nationality and, when she has been sold under that sentence to third parties, the new owner enters into an indisputable right of property, for the newly acquired nationality must be respected every where without exception. If the condemned vessel is subsequently purchased by her former owners, after a legal sentence of confiscation by a competent foreign tribunal, she must be registered as a new vessel before she becomes legally entitled to resume her original nationality. *

* Where a British vessel has been seized in a French port for an alleged violation of French municipal laws, condemned, and sold under that sentence to a French merchant, and afterwards recaptured on the breaking out of a war between France and England, it was held that she could not be restored on salvage to the former British proprietor; the restitution to the former owner mentioned in the Prize Act being confined to property taken by the enemy as prize. The *Jeune Voyageur*. 5 *Rob.* I. HALLECK. Intern. Law. Edit. Sherston Baker. Vol. II. Chapt. XXXV. Right of Postliminy, etc.

CHAPTER XVI.

OBJECTS OF MARITIME INTERNATIONAL PROTECTION.

Principle of maritime international protection.

§ 115. The main object of maritime international protection is the commerce of the world, in its peaceful and civilizing aspects. All civilized Nations are equally bound, as a matter of duty, to protect the international trade routes which are the arteries of civilization, on the principle of the *mare librum* and of the free *international thoroughfares*, as described in paragraphs 90–92.

In time of peace this international obligation is universal and unqualified, but when two or more of these natural protectors of the common good are at war or in serious complications, then this duty assumes a specific nature, and becomes qualified through there being two essential divisions in the camp of mutual relations, viz., the interest of the belligerent on the one hand and the common interest of the neutrals on the other hand, a marked difference of aim attaching to either side. The former, without denying the right of free international commerce, is not in the position to grant uncontrolled freedom and protection, and the latter, while admitting the right of the belligerent to watch commerce or even to restrain it for purposes of war, is nevertheless strictly on the look-out to prevent all unnecessary or arbitrary dealings founded on the plea of the rights of belligerents.

This constitutes the main principle of neutrality which produced a peculiar line of policy, called *Armed Neutrality*, during the last century and especially since the beginning of the present century. Hence the rights of belligerents and neutrals form the most essential part of the laws of war. These will be treated in Part V. At present we have only to do with that uncontrolled freedom and protection due to the general international commerce which constitutes the blessings of peace and good will among civilized Nations, and proves the universal utility of International Law, through whose rules the common interests of civilization are placed in the safe keeping of Nations during war as well as in times of peace.

Objects of maritime international protection.

§ 116. Besides the securing of the perfect freedom and safety of the open sea by the tacit instrumentality of an international policy regarding the high sea, especially with regard to the suppression of piracy and of the slave trade, and the maintenance of free passage on those trade routes which have been declared neutral by common agreement of maritime Powers, * there are other objects which have been placed, by express international agreements, under maritime international protection. The principal objects of this class are rules made to avoid collisions at sea, the international code of maritime signals, life-boat institutions, pilotage, sea-fishery, postal and telegraphic communication.

International rules of the road at sea.

§ 117. *Rules of the road at sea* are, as stated above (§ 77), regulations for preventing collisions at sea, by determining, as minutely as possible, the manner in which ships are to be

* With regard to the neutrality of the Suez Canal, we refer our readers to the discussions of Prof. Holland in the Fortnightly Review of July, 1883, and Prof. Lawrence, in the Law Magazine and Review of February, 1884.

steered or otherwise handled when approaching each other so as to be in danger of collision. These regulations refer also to the look-out which is to be kept, and to the lights which are to be carried, in order that those on board of either vessel may have timely warning of the approach of the other. To these rules all civilized maritime Nations have given there adhesion and they may thus be regarded as incorporated in Public International Law. *

The importance of diminishing as much as possible the risk of collision between ships at sea, which involves so much danger to life and property, has led to the establishment of this uniform code of rules by general acquiescence.

The last amended edition of these regulations, viz. that of 14th August, 1879, coming into operation on 1st of September, 1880, was agreed to by the following States to whose ships these regulations are declared applicable, viz., Austria, Belgium, Brazil, Chili, Cochin, Denmark, Ecuador, France, Germany, Great Britain, Greece, the Hawaiian Islands, Hayti, Italy, Japan, Kattayawar, Khelat, Kutch, the Netherlands, Muscat, Norway, Peru, Portugal, Russia, Spain, Sweden, Travancore, Turkey, the United States of America and Zanzibar.

The rules of the road at sea being designed for the navigation of the open sea and internationally free waterways (§§ 90–92), it is understood that nothing in them shall interfere with the operation of any special rules made by the respective municipal legislatures, relative to the navigation of any harbour, river or closed bay (§ 89) or inland navigation, nor with the oper-

* RICHARD LOWNDES. Admir. Law of Coll. at Sea. Edit. 1867. Introd. HALLECK. Vol. I. App. p. 513. The *Scotia* and the *Berkshire*. 14. Wall. 170.

ation of any special rules made by the Government of any Nation, with respect to additional signal lights, for two or more ships of war or for ships sailing under convoy. On the other hand, local customs cannot justify departure from the rules of the road at sea, except in cases which appear conspicuously exceptional owing to special local circumstances. Such exceptions must be as distinct and definite as the general rules, for the liability for damage done by a vessel depends upon the laws of the place where the collision occurs, when in territorial waters.* Mr. Marsden, in his *Treatise on the Law of Collisions at Sea*, illustrates the necessity of adhering to the general rules by treating the two cases in which, by British law, damages can be recovered against another ship, apart from the question whether the collision was caused by her fault or not. We reproduce these here as an extension of the rules noted above, with regard to collision, in paragraph 77. Sections 16 & 17 of 36 & 37 Vict. c. 85 determine liability in case of infringement of regulation regarding collision, as follows:—

Sections 16 & 17 of 36 & 37 Vict. c. 85.

"Section 16. In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel the name of his own vessel, and

* RICHARD LOWNDES. The Admiralty law of collision at sea, chapt. III.

of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound."

"If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

"Every master or person in charge of a British vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid, shall be deemed guilty of a misdemeanor * and if he is a certificated officer, an enquiry into his conduct may be held and his certificate may be cancelled or suspended."

Section 17 states: "If in any case of collision it is proved to the Court, before which the case is tried, that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulations have been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court, that the circumstances of the case made departure from the regulation necessary."

Obligation to stand by each other after collision.

The first case above mentioned is that where a ship, after colliding with another ship, neglects to stand by the other after the accident.

"The temptation for a ship, says Mr. Marsden, to run away from another with which she has been in collision by her own fault, in the hope of escaping detection, has been found in many cases stronger than the dictates of humanity. 'Standing by' was first made a statutory duty by 25 and 26 Vict. c. 63, § 33. Previous to this Act, however, the duty of one ship to render assistance

* Punishable by fine of £100 or imprisonment for six months, 17 & 18 Vict. c. 104, § 518.

to the other was distinctly recognized by the Admiralty Court, and failure to stand by a ship injured in a collision was punished by compelling the defaulting ship to pay the costs of the suit, although she was free from blame in other respects, and successful in the suit."

"However free from blame a ship may be in other respects, and however wanton the collision on the part of the other ship, the law requires each to stand by the other. If either ship fails to do so, in the absence of proof to the contrary, she will be held to be in fault for the collision, and will be unable to recover the whole of her loss."

"The 'person in charge' mentioned in section 16 is the master, although at the time of the collision the ship is in charge of a pilot. If the master is below, the duty to stand by lies on the mate or other person in charge of the deck, until the master comes on deck; if life or property is still in danger, it is then transferred to the master. Where a collision occurred between a ship in tow and a third ship, it was said by Sir Robert Phillimore that the Act of 1862 required the tug to stand by the ships in collision."

"The penalty for not 'standing by' is strictly enforced. A ship must obey the law although there is some risk to herself, and the other appears to be in no danger. A steam-ship was held in fault for not standing by another with which she had been in collision, although, being in narrow waters, and herself of greath length (450 feet), she could not do so without risk of going ashore, and although she had hailed another ship, better able to assist to do so."

Salvage after collision.

"Although a vessel which fails to render assistance to another with which she has been in collision breaks the law, it appears that her right to

salvage remuneration, where she renders assistance to a ship with which she has been in collision by no fault of her own, is not affected by 36 & 37 Vict. c. 85, § 16. In a case under the Act of 1862, it was held that the right to salvage reward of a tug, whose tow was damaged in a collision with a third ship, for which the latter was in fault, was not affected by the statutory enactment as to standing by."

The "standing by" section of the Act of 1862 was held to apply in the case of collision with an open fishing-boat.

Obligation to observe regulations.

The other case in which damages can be recovered in case of collision without proof of negligence on the part of the defendant contributing to the collision, is that referred to in section 17 of 36 & 37 Vict. c. 85, as quoted above. The object of that section was to enforce the observance of the regulations and to lessen the difficulty of deciding collision cases upon evidence which is often conflicting. Its effect is to exclude proof that an infringement of the regulations, which might have contributed to the collision, did not in fact do so. The statute, therefore, imposes on the vessel guilty of an infringement the burden of proving not only that it did not, but that it could not, by any possibility, have contributed to the collision.

"If the regulation which has been infringed, says Mr. Marsden, is one which has no possible connection with the disaster, and which could not by any possibility have contributed to it, the section does not apply. If, for example, a vessel is run into by another approaching her from her port side, she will not be held in fault under section 17 for having no light on her starboard side. In the case of the *Fanny M. Carvill* it was held that the other ship, the *Peru*, was not in fault

under section 17, because her screens were seven inches short of the statutory length (3 feet); it being proved that her lights were not in fact seen across her bow."*

Application to foreign ships of §§ 16 & 17 of 36 & 37 Vict. c. 85.

With regard to the application of these rules to foreign ships, Mr. Marsden makes the following additional remarks. "Nearly all maritime Nations having adopted the regulations, and the Courts of this country (England) being required by the municipal law to apply the regulations to the ships of all Nations that have adopted them, the rule of the road is the same for all ships, and the same rule is recognized alike by international, municipal and maritime law."

"Foreign ships, equally with British ships, are bound to know and observe local regulations for preventing collisions in force in various rivers and harbours of this country."

"The law by which the owners of a ship which has been in collision are, upon proof of certain circumstances as to infringement of the regulations, or not standing by to assist the other ship, made liable for the collision, without further proof of negligence upon the part of their ship, has been laid down in §§ 16 & 17 of 36 & 37 Vict. c. 85 (quoted above). There seems to be no doubt that this enactment applies to foreign ships. In two cases recently before the Admiralty Division, it was assumed that it applied to a British ship in collision with a foreigner on the high seas. The wording of 36 & 37 Vict. c. 85, § 16, favours the contention that that part of it which relates to presumption of fault applies to foreign as well as British ships. Both sections, moreover, would

* REGINALD G. MARSDEN. Collision at sea, Edit. 1880. p. 12, et seq. The *Fanny M. Carrill*, L.R. 4. A. & E. 417–422.

probably be held to be rules of evidence, or otherwise applicable to foreign ships as *lex fori*."

"It was held by Dr. Lushington in the *Zollverein*, Swab. Ad. 96, that § 298 of 17 & 18 Vict. c. 104, was a *lex fori* relating to remedies. In that case the section was held not to apply in the case of a collision between a British and a foreign ship on the high seas, so as to prevent the British ship from recovering against the foreigner. The ground of the decision was that the previous section (§ 296), containing the rule of the road, was a municipal law not applicable to foreign ships on the high seas, and that therefore § 298, which depended on § 296, had no application to the foreign ship. Since, therefore, the foreigner was not prevented by § 298 from recovering against a British ship that to which by the maritime law he would be entitled, it was held to be unfair to allow the foreigner to avail himself of a breach by the British ship of the municipal law as a defence. But the now existing regulations being international, it is submitted that the decision in the *Zollverein*, as to the application of § 298 of the Act of 1854, affords no ground for contending that § 17 of the Act of 1873 does not apply to foreign ships. In the *Nevada*, I. Asp. Mar. Law, Cas. 477, however, the Vice-Admiralty Court of N. S. Wales held that § 33 of the Act of 1862 did not apply to an American ship. In the *Germania*, 3 Mar. Law, Cas. O. S. 140, § 29 of 25 & 26 Vict. c. 63 was applied to a foreign ship; but in the same case, on appeal (ibid 269), Lord Romilly appears to have considered that § 33 of that Act (as to 'standing by') applied only to British ships. In the *Thuringia*, I. Asp. Mar. Law Cas. 283, nothing was said as to the application of that section to a foreign ship on the high seas. As

to the effect of §§ 57 and 58 of the same Act, see the observations of Lord Chelmsford in the *Amalia*, I. Moo. P. C. C. N. S. 471, 485." *

American Laws. There is no law in America corresponding to 36 & 37 Vict. c. 85, § 17. The Supreme Court has declared that it will not "accept blindly an artificial rule which is to determine in all cases whether the navigator is liable to the charge of negligence in causing any damage that may happen." The *Farragut*, 10 Wall. 334. But the burden is on a vessel which has infringed the statutory regulations to prove that the infringement did not contribute to the collision. The *Pennsylvania*, 19 Wall. 125; the *Ariadne*, 2 Bened. 472. If, however, such proof is forthcoming, a ship will recover full damages, although she did not comply with the regulations: I. PARSONS, on Shipping, ed. 1869, pp. 596 and 597; *Chamberlain* v. *Ward*, 21 How. 548, 567; *The Gray Eagle*, 9 Wall. 505; *The Continental*, 14 Wall. 345; *The Sunnyside*, 1 Otto. 208; *The City of Washington*, 2 Otto. 31. *Blanchard*, v. *New Jersey Steamboat Co.*, 59 New York Rep. 292, and *Whitehall Transport Co.* v. *New Jersey Steamb. Co.*, 51 N. Y. Rep. 369; and *Hoffman* v. *Union Ferry of Brooklyn*, 7 Amer. Rep. 435, are decisions of the State of New York Courts to the same effect. In the *Pennsylvania* case a steamship and a sailing-ship were in collision. The latter was not sounding her fog-horn, but was ringing a bell, though she was under way. The Supreme Court refused to admit evidence that the bell could be heard farther than the horn, and held that the sailing-ship was in fault for the collision. The following passage, which occurs in that judgment of the Court, shows that the law in America, as to the effect of an infringement

* MARSDEN. Page 90, et seq.

of the regulations, is identical with that of Great Britain. "Where a ship, at the time of collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the collision. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *

International Signal Code.

§ 118. The *International Code of Signals* is likewise to be regarded as forming part of International Law, having been adopted by all civilized maritime Nations.

The attention of the principal maritime Powers have long been directed to the necessity of adopting an international system of signalling at sea, by means of which vessels of all Nations should be able to correspond with or make their wants known to one another, by certain arbitrary signs having a universal signification. When, therefore, the Governments of France and Great Britain brought the subject prominently forward and invited the attention of the maritime Powers to the manifest advantages which the *Code of Signals* to be used at sea, as prepared and published, in April 1857, by the British Board of Trade, afforded for this purpose, the several Governments, satisfied as to the superiority of this code over every other method of signalling, decided on adopting it for the use of their merchant vessels and ships of war. This code has accordingly been adopted by all the civilized maritime Powers in the same manner as the rules of the road at sea, and can rightly be called the International Code; being now exclu-

* The Pennsylvania. 3 Mar. Law Cas. O. S. 177. MARSDEN p. 19.

sively used on board the ships of war and at the signal and semaphore stations of all civilized countries. It has been translated into the Danish, Dutch, French, German, Italian, Norwegian, Portuguese, Spanish and Swedish languages. *

Life-Boat Institutions.

§ 119. *Life-Boat Institutions* are also well worthy of international acknowledgement and recognition, by general convention.

The life-boat is a boat adapted to "live" in a stormy sea, with a view to the saving of life from shipwreck. Its qualities must be buoyancy, to avoid foundering when a sea is shipped; strength, to escape destruction from the violence of waves, from a rocky beach, or from collision with the wreck; facility in turning; and a power of righting when capsized. The advantages of the life-boat may be thus summed up. The air-chambers and the light ballast render sinking impossible; the keel nearly prevents capsizing, and rectifies it, if it does happen; while the relieving tubes effectually clear off any water that finds its way within. With such precautions, the safety of the crew appears almost assured, and, in fact, loss of life in a life-boat is a very rare occurrence.

The importance of the life-boat in saving life can scarcely be over-estimated. Hundreds of vessels have their crews rescued through its use every year; and, as the different national life-boat institutions obtain funds, life-boat establishments are being gradually extended all round the coasts of all civilized countries, and this humane maritime institution can fairly claim unqualified international protection.

* The *International Code of Signals*, for the use of all Nations; prepared under the authority of the British Board of Trade, by ROBERT JACKSON, Esq., Registrar General of Shipping and Seamen. Published for the Committee of Lloyd's by Spottiswoode & Co., 54 Gracechurch Street, London 1882.

Incorporated life-boat institutions, duly recognized by their respective Governments, and whose objects are to provide and maintain, in efficient working order, life-boats of the most perfect description at all parts of the coast, and to provide, through the instrumentality of local committees, for their proper management, should be internationally and expressedly recognized as neutral institutions and their properties respected by all parties, in war as well as in time of peace. *

Pilotage.

Pilotage necessarily an object of international agreement.

§ 120. Pilotage often forms the subject of conventions between co-riparian States, but might also be extended to more general maritime international treaties for the sake of greater convenience and security in navigation and also to settle, by international understanding, questions arising with regard to so-called *compulsory pilotage*.

Compulsory pilotage exists in many countries, as in Great Britain, the United States of America, † France ‡, Germany, the Netherlands, Belgium, Spain, Portugal, Austria and the Argentine Republic, but with the exception of Great Britain

* As an illustration of the great international value of Life-boat institutions in general, we quote here some details, showing what one such institution can perform in a civilized country. The Committee of the British Royal National Life-boat Institution, in their Sixtieth Annual Report, state that the number of life-boats now under the management of the Institution is 274. The total number of Life-boat-launches during the year 1883 was 283; lives saved 725; and vessels saved 30. In addition to these services, 230 lives were saved from shipwreck by shore boats and other means, which had received rewards from the Institution, making a total of 955 lives rescued during the year 1883. The number of lives saved during the sixty years, from the establishment of the institution to the end of the year 1883, is 30,563. During the year 1883, the receipts of the institution, in donations, subscriptions and dividends, amounted to £40,250 while the expenditure was £45,817.

† See PARSONS. On Shipping. Ed. 1869, II. p. 117.

‡ See CAUMONT. Abordage Maritime. §§ 191-194. SIREY et GILBERT. Codes Annotées. C. C. Art. 216, § 9. SIBILLE. Jurisprudence etc., d'Abordage, p. 280.

and, to some extent, Germany (*Allgemeines Deutsches Handelsgezetsbuch*, Art. 740), the principle, that owners are not responsible for the fault of a compulsory pilot, does not prevail. *

The Spanish Commercial Code (Art. 676, 691 and 693) places the pilot in the position of adviser to the captain, and the ultimate authority and responsibility of the latter is expressly preserved. In America pilots of passenger ships have a special authority; 10 Stat. at Large, Ch. 66, § 28.

The Canadian Pilotage Act, 36 Vict. c. 54 (Canada), makes the payment of pilotage dues compulsory, but expressly provides that no ship need be placed in charge of a pilot (ss. 56, 69) and that nothing in the Act shall be deemed to exempt owners from liability for the fault of a licensed pilot (s. 69).

Principles of British law, regarding compulsory pilotage.

With reference to what is stated in section 68, sub-section 21°., as a general rule with regard to the responsibility of the pilot in charge, in connection with the liability of owners, we note here the following rules laid down by English law with regard to compulsory pilotage.

By the laws of Great Britain, the principle on which a shipowner is made liable for damages done to another ship by improper navigation on the part of the captain or crew, is, that a master is responsible for the misconduct of the servants in his employ. A pilot who is taken on board by compulsion of law, and who is consequently not appointed, nor can be dismissed, by the shipowner, is not considered as his servant, in such a sense as to make the shipowner responsible for the pilot's misconduct. Mr. Richard Lowndes makes the following statements with regard to this principle of British Statutory Law.

* Report of the British Pilotage Committee, 1870.

"It is only by degrees that this principle has come to be recognized by the Admiralty Court. In the earliest reported case on this subject, it was held by Lord Stowell, that a foreign ship-owner could not claim exemption from liability for a collision, where his ship was in fault, on the plea that the collision was the result of orders given by a regular pilot."

'The owners,' said the learned Judge, 'are responsible for the acts of the pilot, and they must be left to recover the amount as well as they can from him.'

"In the case of the *Christiana*, there was cited in argument a clause of the General Pilot Act (6 Geo. IV., c. 125, § 25), which enacted that 'no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act. In the decision of this case, Sir Christopher Robinson held himself to be bound by this clause in the case of a foreign as well as of an English ship. But, in the subsequent case of the *Girolamo*, the same learned Judge considerably narrowed the effect of the Pilot Act, by laying down the positions, that this statute could not affect the jurisdiction of the Court of Admiralty in cases of collisions with foreign ships upon the high seas; that the clauses in the Act exempting 'owners' from liability might be read as merely taking away their personal liability, leaving the remedy *in rem* intact; and that the taking of a pilot could not be considered compulsory, when there was no penalty attached to a refusal to take him,

beyond the liability to pay the regular charge for pilotage, whether a pilot were employed or no. On all these points, as will be seen, the decision in this case has since been overruled. In the cases, however, of the *Baron Holbery* and the *Carolus*, it was again held, by Sir C. Robinson, that the provisions of the Pilot Act could not affect the position of foreign shipowners in the Admiralty Court."

"The law on this subject was first (so far as the Court of Admiralty is concerned) placed on its present basis by Dr. Lushington, in the important decision of the *Maria's* case, in the year 1839. In this judgment, after a critical review of the previous cases, and particularly of two apparently conflicting decisions in the Common Law Courts, the learned Judge came to the conclusion that, on grounds of natural equity, independently of the provisions of the Pilot Act, the owner of a ship should not be held liable in damages for a collision occasioned by the fault of a pilot compulsorily taken on board. If, he said, "the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of the *Maria* exempt from responsibility, upon general principle, without reference to Acts of Parliament; for, in that case, the pilot was not their servant, and the maxim '*qui facit per alium facit per se*,' does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not. The learned Judge then proceeded to give his reasons for coming to the conclusion that, in the case before him, the taking

of a pilot was compulsory, and accordingly dismissing the owners of the *Maria* from the suit. 'The opinion I have thus formed in this case,' he added 'is founded upon the general principle of reason and justice, that no one should be chargeable with the act of another who is not an agent of his own election and choice, and I further think that it would be contrary to all sense of equity, to say to the owners of a foreign vessel you shall take a pilot of our selection, of our appointment: be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing." *

The principle thus laid down by Dr. Lushington afterwards received the sanction of the English Legislature, in the following clause in the Merchant Shipping Act:—"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

"The exemption thus given by statute is to be construed strictly; the pilot must be 'acting in charge of the ship,' if his act is to relieve the ship from liability. The statute, however, is merely declaratory of a principle based, as has been said, upon natural equity. Consequently, whether or no the words of the statute are sufficiently extensive to apply to foreign ships colliding on the high seas, such vessels are on general principles entitled to this exemption." †

* Maria, IV. Rob. 95.

† RICHARD LOWNDES. The Adm. Law of Coll. at Sea. p. 102, et seq. *Johanna Stoll*, 1 Lush, 312.

British Pilotage Authorities.

Compulsory pilotage exists in Great Britain only in waters within the jurisdiction of a duly constituted pilotage authority and for certain classes of ships on particular voyages. Some of the principal pilotage authorities, such as the

Trinity Houses.

London, Hull, Newcastle, and Leith Trinity Houses, were originally constituted by charter; but these, as well as various other authorities existing around the shores of the United Kingdom, are now regulated by Act of Parliament. The Acts relating to pilotage are general and local. The general law as to pilotage is contained in the Merchant Shipping Acts, 1854–1876. *

The Acts authorize bye-laws to be made for the regulation of pilotage, which in some cases are required to be approved by Her Majesty in Council.

To ascertain whether, in a particular case, pilotage is compulsory or not, it is necessary to consider the combined effect of the general and local Acts, and of the bye-laws for the time being in force under them. The question is frequently one of considerable difficulty. †

Rules of Suez Canal Pilotage.

The substance of the regulations for the navigation of the Suez Canal (of 1st July, 1878) is as follows (a):—The maximum speed is to be five and a half knots. All ships over 100 tons are to take pilots; but *the responsibility as regards the management of the ship devolves solely on the captain;* yards are to be braced forward; jib-booms to be in; and a kedge ready to let go astern; a boat is to be towed astern: watch to be kept by day and night; hands are to be stationed ready to let go hawsers; navigation at night is at the captain's risk. Ships moored are

* 17 & 18 Vict. c. 104. Part V.; 25 & 26 Vict. c. 63. §§ 10–12; 35 & 36 Vict. c. 73, §§ 9–11; 36 & 37 Vict. c. 85. §§ 19 & 20. As to Cinque port pilots, see the unrepealed sections of 16 & 17 Vict. c. 129.

† MARSDEN. p. 117.

to show a light forward and another aft; otherwise the usual lights to be carried, except that on the approach of another ship, *two white* lights are to be shown over the side on which the other is to pass; whistles are to be blown on ships approaching and passing; steamships are to stop when the passage is not clear, and to reduce speed when passing craft. "Whenever a collision appears probable, no ship must hesitate to take the ground, and thus avoid collision. The expenses consequent upon a grounding, under these circumstances, shall be defrayed by the ship in fault." Vessels approaching are to reduce speed and hug the starboard side, if required to do so by the pilot; vessels are not to overtake and pass others, except when necessary, and then only at sidings and by the direction of the Canal authorities. *

Sea-Fishery.

The Hague Fishery Convention of 1882.

§ 121. Sea-fishery was always an object of protection by public law. By the *Ordinance de la Marine* of 1681, the 5th section of which was headed *de la pêche qui se fait en mer*, the principle was upheld that the exclusive right of fishery on the sea-coast of a State, within its territorial waters, qualifies the respective State to maintain an active police supervision on these waters to restrain the trespassing of others on its rights. These principles are developed and defined in the convention, signed at the Hague on the 6th May 1882, between Belgium, France, Germany, Great Britain, Denmark, the Netherlands and Sweden and Norway, for the preservation of order among the different nationalities of fishermen in the North Sea outside territorial waters. The principle features of this convention, *pour règler*

* See Nautical Magazine, 1878, 572.

la police de la pêche dans la mer du Nord en dehors des eaux territoriales, are the following:—The exclusive right of national fishermen to fish within three miles of their respective coasts (art. 2). Outward distinctive tokens to identify each fishing boat of the different nationalities (art. 5–13). Regulations with regard to time and mode of fishing and the fishing-apparatus to be used (art. 14–24). The supervision and control to be exercised indiscriminately, by cruisers of the contracting States, with distinction, however, in the case of certain infringements of the rules, which can be adjudged solely by cruisers belonging to the same nationality as the transgressor (art. 27–28), while, in any case, the national tribunal has exclusive jurisdiction (art. 36). When the commanding officer of a cruiser, belonging to any of the contracting States, has reason to believe that an infringement of the rules of the convention has been committed, he can insist on the master of the infringing vessel to lay before him the proofs required to ascertain his nationality, and when, in cases of serious irregularity of conduct, it becomes necessary to act repressively, in order to avoid serious disturbances, the commanding officer of the cruiser is justified in taking the offending fishing boat into custody and to conduct her to the nearest port of the State to which the transgressor belongs (art. 29–30).

International Postal and Telegraphic Communication.

Postal Union.

§ 122. *Postal Union.* By a Convention, entered into at Paris, in June, 1878, the terms of the Postal Convention of Berne of 1874, were considerably extended. The contracting parties agreed that they, as well as those States which

might join the Convention thereafter, should form, under the name of the *Universal Postal Union*, a single postal territory for the reciprocal exchange of correspondence by post, while certain stipulations were concluded in that behalf granting uniform postage from and towards the respective postal establishments.

The countries now comprised within the Universal Postal Union are:—The Argentine Republic, Austria-Hungary, Belgium, Brazil, Bulgaria, Chili, Columbia, Denmark and the Danish Colonies, Egypt, Ecuador, France and the French Colonies, Germany, Great Britain and British Colonies, Greece, Guatemala, Hawaii, Hayti, Honduras, Italy, Japan, Liberia, Luxemburg, Mexico, Montenegro, the Netherlands and Dutch Colonies, Nicaragua, Norway, Paraguay, Peru, Persia, Portugal and Portuguese Colonies, Roumania, Russia, Salvador, San Domingo, Servia, Spain and her Colonies, Sweden, Switzerland, Turkey, the United States of America, Uraguay, Venezuela.

Regarding mail boats *(paquebots poste, Postdampfer)* we have noted already in paragraph 109, page 448, that certain privileges granted to them result from the Postal Convention or from special treaties. *

Submarine Telegraph Cables.

Union télégraphique. International Conferences in behalf of the protection of sub-marine telegraph cables.

§ 123. The telegraphic union *(Union Télégraphique)* was established by an international conference at Paris, in the year 1869. This union was subsequently confirmed and developed by

* By a Postal Convention of 1843, between France and England, it is agreed that, in case of war, the mail packets between Dover and Calais may continue their navigation until notification be made by either Government, in which case they shall be permitted to return freely to their respective ports. This agreement is extended to all mail packets, of either Government, by Convention of September 24, 1856.

successive conferences held at Vienna in 1868, at Rome in 1871, at St. Petersburg in 1875, in London in 1879. Thus during many years the question regarding the international protection of telegraphic communication has been occupying the leading statesmen of all civilized Nations.* There is, however, a vast difference between the conditions affecting overland telegraphs and oceanic cables. The first establishment of land telegraphs is less expensive and the repairs of damages also are more easily effected than in the case of oceanic telegraphs. In time of peace the land wire is sufficiently protected by municipal legislation, while, in time of war, the destruction is confined to the country in actual occupation of the enemy and rapidly restored on the cessation of hostilities. The destruction of a submarine cable, on the other hand, entails far more serious consequences, while, even in time of peace, the protection of the oceanic cable is always very uncertain, owing to the very nature of the neutral zone which it traverses; for this reason the position of a cable forms an object of international protection in consequence of the very nature of the thing.

Resolution of the Institut de Droit International.

The Institut de Droit International having appointed a special committee from among its members † to report concerning the protection, in time of peace and war, of those submarine

* See the essays of C. ASSER, *De Telegraphie en hare regts-gevolgen*, the Hague 1866; of Dr. P. D. FISHER, Geh. Ober-Postrath. *Die Telegraphie und das Völkerrecht*, Leipzig, 1876: and of Prof. L. RENAULT, *Etudes sur les rapports internationaux*, and *La poste et la télégraphie*, Paris 1877, in which works the legal and international telegraphic questions are elaborately treated. See also: *Correspondence between the Board of Trade and the Telegraph-Cable Companies on the subject of protecting from injuries Submarine Cables and Vessels engaged in laying and repairing Submarine Cables*, published by the British Government in July 1882.

† The members of this committee were: M. M. RENAULT (*rapporteur*), BLUNTSCHLI, GOOS, SIRAPOLOS and WESTLAKE.

telegraph cables which have an international importance, the able report, drawn up by Professor Louis Renault, of Paris, was read during the sessions of the *Institut*, held at Brussels in September 1879, and after due deliberation the following resolutions were unanimously adopted by the *Institut*, in the session of 5th September.

I. *Il serait très utile que les divers États s'entendissent pour déclarer que la destruction ou la détérioration des câbles sous-marins en pleine mer est un délit du droit des gens, et pour déterminer d'une manière précise le caractère délictueux des faits et les peines applicables; sur ce dernier point, on atteindrait le degré d'uniformité compatible avec la diversité des législations criminelles.*

Le droit de saisir les individus coupables, ou présumés tels, pourrait être donné aux navires d'État de toutes les nations, dans les conditions reglées par les traités, mais le droit de les juger devrait être réservé aux tribunaux nationaux du navire capturé.

II. *Le câble télégraphique sous-marin qui unit deux territoires neutres est inviolable.*

Il est à désirer, quand les communications télégraphiques doivent cesser par suite de l'état de guerre, que l'on se borne aux mesures strictement nécessaires pour empêcher l'usage du câble, et qu'il soit mis fin à ces mesures, ou que l'on en répare les conséquences, aussitôt que le permettra la cessation des hostilités. *

International Convention for the protection of sub-marine Telegraph Cables.

§ 124. After several international efforts the project of a convention for the protection of submarine cables, *in time of peace*, was provisionally agreed upon by the representatives of the different Maritime Powers, assembled in conference at Paris, on the 2nd November, 1882. This

* *Annuaire de l'Institut de Droit International*, 1879–1880. Première Partie. p. 394.

project was finally discussed in a subsequent conference, held at Paris in October, 1883, and on the 18th of March, 1884, an international convention for the protection of submarine cables, in time of peace, was signed at the Department of Foreign Affairs in Paris. The different contracting Powers numbered twenty-eight, including all the States of Europe and America and the civilized Nations of the East.

The provisions of this convention are as follow.

Article I establishes the scope of the convention which is to embrace all sub-marine telegraph cables, legally established with the sanction of one or more of the high contracting parties, and landing on the territories of one or more of the Powers, including their colonies. The international agreement is confined to the parts of a cable outside the territorial waters of any State, *i. e.* where no State has an exclusive jurisdiction.

Article II declares those who wilfully or through culpable negligence remove, destroy, disturb, obstruct, or injure any oceanic or submarine cable not their own, or any part thereof, guilty of a misdemeanor, punishable by criminal law, and the perpetrators are declared liable to damages when such actions have caused any interruptions, partially or totally, in the telegraphic communication. This rule is not applicable to those cases of compelled rupture or deterioration of a cable, as unavoidable action for the preservation of life or ship, provided all necessary precautions to avoid such extreme alternative have been taken by those implicated and they can prove to have acted through unavoidable necessity.

Article III engages, on the other hand, the contracting Powers to impose such conditions, on granting concessions for cables, as may tend to

secure all reasonable precautions to be taken by the respective telegraph cable contractors for the safety of the shipping, as well with regard to the locality where the cable is to be laid and landed, as with regard to the strength and dimensions of the cable.

Article IV provides for the case of a cable contractor who, while laying his cable, causes the rupture or deterioration of another cable previously laid, by making him liable for all damages and costs of the repairs and losses, apart from the application against him of the penalty provided for in Article II.

Article V contains rules with regard to signals to be shown, by day and by night, from a vessel when occupied or in the act of laying down a cable, during the whole time the operation lasts. All other vessels and fishing boats of any nationality are bound to take heed and to keep off, at least at the distance of one mile from the cable vessel, when she is at work, as soon as they observe the signals. Fishing boats are allowed twenty-four hours to remove their nets and fishing apparatus from the neighbourhood of the cable vessel at work. On the other hand, the cable vessel, thus impeding the usual traffic, is obliged to complete her operations in the shortest time practicable.

Article VI. When observing the buoys placed over the cable, when this is being laid or repaired, all vessels, including fishing boats and their nets, are bound to keep clear of such buoys at a distance of not less than one quarter of a mile.

Article VII. Owners of vessels or fishing boats who can prove that, in order to avoid damaging cables, they have sacrificed anchors or any fishing apparatus, have a right to indemnification from the respective telegraph-cable company, provided

they enter a written declaration to that effect, accompanied by due evidence, within twenty-four hours after their arrival in any port; this declaration to be filed at the office of the competent local authority, who gives notice of the case to the respective Consular officer or to whom it may concern.

Article VIII. The competent tribunal for the adjudication of telegraph delicts is that of the State to which the person or the vessel or fishing boat belongs, by whom or on board of which the offence prohibited by the Convention has been committed, and the penalty to be inflicted shall be in conformity with existing treaties concluded to that effect or with the laws of each State as applicable to their subjects or citizens respectively *i.e.* the *lex fori.*

To this article the International Conference of 1883 added the request *(vœu)* that the different Governments may deem it proper to establish rules by which the conditions are determined under which extradition may be obtained in the case of any person who, having committed acts of destruction or deterioration affecting legally established submarine cables, in contravention of the provisions of the Convention, places himself, to avoid punishment, outside the jurisdiction of the competent tribunal, by taking refuge in another State.

Article IX stipulates that, in case of infringement of Articles II, V and VI of the Convention, prosecution shall be instituted by or in the name of the State to which the transgressors resort.

Article X contains the rules of evidence with regard to the cases above stated. These rules are to be in conformity with the modes of procedure in criminal cases as laid down by the *lex fori.* When the commanding officer of vessels

of war or of a public vessel of any of the contracting Powers, specially commissioned as a cruiser for this service, has reason to suspect that an infringement of the Convention has been committed by any private vessel or fishing boat, he is entitled to require the master of such vessel or boat to exhibit his ship's paper or other documents proving his nationality. Of this act and exhibition of papers a note is made, on the documents produced, by the commanding officer of the cruiser. Besides the verification of the ship's nationality the commanding officer may draw up a written report of the case, mentioning the particulars and circumstances *(procès-verbal)* and he may do so in the case of any vessel inculpated to whatever nationality she may belong. This report of the commanding officer, signed by himself, may serve as proof or evidence in the case before the competent tribunal, in conformity with the *lex fori*. The accused and the witnesses, mentioned in the report, are entitled to add on the documents, each in his own national language, all explanations which they might think useful, but such declarations must be signed by them. If the accused cannot write, he may ask any person present to add a declaration on his behalf, and after this has been read and explained to him, he shall put a token or cross to it as customary under his national laws.

Article XI stipulates that the procedure of adjudication, with regard to infringements of the Convention shall be as simple and summary as the respective legislature may permit.

Article XII. The high contracting parties engage themselves to bring before their respective legislatures, the measures to be adopted for the proper execution of the Convention in general, and especially with regard to the penalties to be

inflicted in the case of offences committed in contravention of Articles II, V and VI. The penalty to be proposed may be imprisonment and fine, to be applied either separately or jointly, in conformity with the merits of each case.

Article XIII contains the promise to bring, reciprocally, to each other's notice the laws already existing or hereafter to be enacted with regard to anything affecting the objects contemplated by the Convention.

Articles XIV, XV and XVI contain the usual treaty clauses with regard to the admission of new parties to the Convention; the date at which the Convention is to come into effect; and the period of time during which it is binding on all parties. This time is fixed at five years, after which the Convention continues in force from year to year, but liberty is then given to renounce the pactum, at twelve months' notice, after the expiration of which term any party to the Convention may withdraw from it. In this case the renunciation of the Convention shall have effect solely with regard to the individual State concerned. Finally it is stipulated that the ratifications shall be exchanged at the earliest date practicable.

Besides the wish or request *(vœu)*, expressed by the Conference of 1883, with regard to extradition, as mentioned above under Art. VIII, this Conference has recommended two other measures as expedient for the proper execution of the Convention, viz., the adoption, with reference to Art. V, of uniform signals, to be shown from a vessel while in the act of laying or repairing cables in order that no doubt might be entertained as to her actual occupation, and with reference to Art. VI, of uniform style and shape of buoys *(bouées)* to indicate the cable

when in process of repair, as well as to show the spot where the cable is laid when running it up the shore. This latter spot is to be indicated also by the adoption of a uniform sort of beacons *(balises)* to be erected on the shore at the place where the cable is landed.

No provision whatever is made by this Convention with regard to the rights and obligations of the contracting parties when in a state of war, and this modern pactum between civilized Nations has therefore no other legal element than the normal state of peace. As such, it may be hailed as the emblem of peace and of the vast results of civilization, for, while shutting out the idea of war, it constitutes the most significant object of maritime international protection all over the globe.

CHAPTER XVII.

HISTORICAL SKETCH OF MARITIME AND COMMERCIAL INTERNATIONAL LAW.

Sources of Maritime International Law.

§ 125. The term Maritime Law includes the rules and usages evolved in course of time by international maritime intercourse. These rules belong partly to the domain of Private Law, partly to the domain of Public Law, and partly to the domain of International Law. In the latter case those rules constitute what is more pertinently called Maritime International Law.

With regard to maritime laws and regulations, Sir Robert Phillimore makes the following observations.

"The marine ordinances or regulations of a State afford valuable testimony, first, as to the practice of the State itself in this branch of International Law; and also, in some degree, as to the usage of Nations, as generally recognized at the time by the jurists and statesmen and legislative assemblies of the country which issued them." *

"When the institutes of great maritime countries agree upon a question of International Maritime Law, they constitute a tribunal from which there can rarely, if ever, be any appeal."

"Certain of these institutes, independently of their agreement or disagreement with other maritime codes, have always been held in the

* WHEATON states the same proposition in a less limited shape. Elements of Intern. Law, p. 101.

highest respect; and certainly no English writer or judge can be accused of national partiality for relying upon them."

"These are the celebrated *Consolato del Mare*, with the commentary of Casaregis, and the French *Ordonnance sur la Marine* of 1681, with the commentary of Valin; and, due regard being had to the modern practice, the *Collection des Lois Maritimes antérieures au XVIII Siècle*, by Pardessus."

"The consent of Nations is also evidenced by the decisions of Prize Courts, and of the tribunals of International Law sitting in each country." *

Under the term *Maritime Law* are comprehended the legal principles *(Rechtsregeln)* which have been gradually established through maritime intercourse since the earliest time of the development of an international commerce. These principles formed the germ of the Law of Nations, the nucleus around which our present *lex mercatoria* grew up, and like this latter it is necessarily perceivable in the different branches of legislation described in paragraph 38.

Historical Sketch of Maritime and Commercial Laws.

§ 126. We have remarked above (§ 38) on the preponderant influence which the legislation of a State exercises on its international intercourse in general, but this is more particularly the case with its commercial and maritime legislation.

The commercial and navigation laws, which cover the principal ground occupied by international intercourse, comprehend, as noted above, all laws made with reference to loan and interest, bills of exchange and negotiable papers, banker's

* PHILLIMORE. Vol. I. Edit. 1879, p. 54.

notes and papers payable at sight to bearer, reclaiming or revendication in matters of commerce, bankruptcy and surcease of payment, sea and river fishing, hiring contracts between masters, shipowners, freighters, and mariners connected with trading, sailing, steam-ship and mail companies and joint property in ships; also insurance, bottomry and average.

The aspect under which these laws present themselves to international jurisprudence is that of conflict of laws, and from this point of view they have been treated above in Chapter X, when we considered the rules of Private International Law with regard to mercantile and maritime laws.

There is such a variety of circumstances modifying the manner in which traffic and navigation is carried on, on the internal water ways of a State or within the maritime jurisdiction along its coasts, by national and foreign vessels of all descriptions, that special regulations had to be enacted by the legislature of each State to meet these peculiar features of its jurisdiction. Such special enactments belong to the different branches of the Public Law of the State and are collectively called Navigation Laws. This term includes all legislation made with regard to the safety of navigation (rules of the road at sea), pilotage, sanitary regulations (quarantine), sea-fishery, postal and telegraphic communication (Chapt. XVI), and those municipal revenue laws which are collectively called customs regulations.

The general principles which regulate all international commerce by land or sea and all navigation of the sea or inland waters for the purposes of international business transactions, collectively constitute, in the case of each Nation making regulations based on those principles, its Commercial Law (*lex mercatoria, Handelsrecht*), but

that particular portion of those regulations which has regard to navigation in general, and all regulations concerning shipping etc., constitute the Maritime Law *(Seerecht)* of the Nation concerned.

Early Maritime and Commercial Laws.

§ 127. Maritime and commercial laws were made at an early period of the world's history as the result of increasing intercourse between the peoples inhabiting different cities and countries. During the Middle Ages the maritime and commercial rules, usages and customs of commercial towns and sea ports were, for the first time, treated as legitimate branches of International Law.

I. The *Rhodian Laws* or the *Maritime Law of the Island of Rhodes*, formed one of the most ancient guide books as regards the legal aspects of commerce and navigation, not merely for the commerce of the Rhodians and the navigation of the Aegean sea, but those laws were in later times generally adopted by the Western Nations of Europe, while those maritime laws which were enacted in the countries afterwards conquered by the crusaders, were observed on the Eastern shores of the Mediterranean. *

The origin of the Rhodian laws has not been definitely ascertained. They were known to the Romans before the establishment of the Empire. Cicero makes mention of these laws and the Emperor Augustus incorporated them in the laws of the Empire.

II. The *Rooles* or *Jugemens d'Oléron*, also called *Roles des Jugements*, are collections of the maritime laws and usages of Venice and other Medi-

* PARDESSUS. Collection of Maritime Laws anterior to the Eighteenth Century.

terranean States. It is supposed that those laws were drawn up by order of Queen Eleanor, Duchess of Guienne. Being promulgated for use in the Western seas, by her son Richard I., Duke of Guienne and King of England, those laws received the name of Queen Eleanor's residence, the island of Oleron (situated on the West coast of France, opposite the mouth of the river Charente).

The Code of maritime laws celebrated under this name is however ascribed by others to the reign of St. Louis of France. Copies of the *Jugements d'Oléron* are appended to some ancient editions of the *Coutumier de Normandie.* *

III. The laws more particularly in vogue throughout the Northern countries of Europe, during the period which elapsed from the twelfth to the sixteenth centuries, are the *Jugemens de Damme*, so named after a sea port of Flanders, forming the port of Brugge. These laws were also called *Lois de West-Capelle.*

IV. The so-called *Coutumes d'Amsterdam* also constituted a code of maritime laws.

V. The *Laws of Antwerp* form another well known code.

VI. The famous maritime laws of Wisby, so named after an island of Gothland in Sweden *(Wisbische Seerechten)* were for some time a celebrated code in that part of Europe, and all along the shores of the North Sea, in the Netherlands, the Baltic and the towns of Wisby, Lübeck, Dantzig, Thorn, Riga, Reval and Narva, and all over Sweden and Norway.

VII. In the *Consolato del Mare*, also called *Bonnes Coutumes de la Mer* (so-called from the opening words of this compilation, *ici commen-*

* CHAMBERS'S ENCYCLOPEDIA. Article *Oleron*. American Edition of 1881.

cent les bonnes coutumes de la mer), we have the first and practically successful attempt at a codification of International Law and the first code of maritime laws that treats of the rights of neutrals in war.

This able compilation first appeared at Barcelona, about the middle of the fourteenth century * and contained a resumé of the maritime laws in vogue at the time, especially in the towns of the Lanque d'Oc, as Barcelona, Marseilles and Valencia, with reference to commerce, navigation and peaceable intercourse, including also rules concerning maritime warfare, the mutual rights of belligerents and neutral vessels, the jurisdiction of prize-courts, etc.

Written by able jurisconsults, who were versed in the Roman Law and acquainted with the legislation of the different maritime towns of France, Spain and the Levant, and who used the Spanish dialect, which was practically the commercial language of that time (the Lingua Romana, the present Catalonia dialect), the *Consolato del Mare* rapidly gained in popularity. Amid the ever shifting principles, continually undergoing changes through treaties of commerce concluded between the maritime Powers of Europe, the *Consolato del Mare* came to be regarded, especially since the last and the beginning of the present century, as the only standard system of Maritime International Law, and it maintained this position until the Declaration of Paris, of 1856, regarding privateers, blockades and neutral commerce.

With regard to neutral navigation in time of war the *Consolato* maintained the following principles to be followed in the treatment of ships and goods.

* PARDESSUS. Collection des Lois Maritimes antérieures au XVIII ciécle. Vol. II. Chapt. XII.

1°. When both the vessel and her goods belong to the enemy, the whole is good prize, as a matter of course.

2°. When the vessel belongs to a neutral and the cargo to the enemy, the neutral captain can be enjoined to conduct ship and cargo to a port belonging to the belligerent captor, where he will receive due and full freight for the cargo as originally agreed upon, the cargo alone being subject to confiscation and the vessel set free.

3°. In case the vessel belongs to the enemy and the cargo to neutrals, a transaction is allowed with the captor to buy the cargo, or, if no agreement can be arrived at, the cargo is taken by the captor, in the confiscated vessel, to one of his ports and landed there after payment to the captor of the original amount of freight which would have been payable if the cargo had arrived at its original destination. *

VIII. The *Guidon de la Mer*, a French compilation, appeared about two centuries after the *Consolato del Mare*, during the latter half of the sixteenth century. It was the work of a private jurisconsult, whose name has not come down to posterity. Though devoid of any official sanction whatever, this compilation enjoyed great respect as an authority on jurisprudence in matters of Private Maritime Law, the principles of which were better understood since the publication of the *Consolato del Mare*, especially with reference to marine insurance and other maritime contracts. †

The decision contained in the *Guidon de la Mer* with reference to *letters de marque*, *maritime prizes* and *représailles* (chapt. VI. X. & XI), as

* WHEATON. Histories. Vol. I. p. 72.

† PARDESSUS. Vol. II. pp. 372–374.

also its formulation of the law of maritime contracts, have been borrowed almost literally and passed into law by the *Ordonnance de la Marine* of 1681. The principles of maritime contracts as laid down in the *Guidon* form the bases of the present commercial code of France. *

IX. The *Ordonnance de la Marine* of 1681, is the French Code of Maritime Law, promulgated by order of Louis XIV. This code embodies not only all the maritime laws and regulations of France, enacted since the reign of Charles VI. in 1400, but also the maritime customs contained in the *Consolato del Mare* and *Guidon de la Mer*, forming thus a systematic compilation of principles and rules relative to maritime prizes and other matters regarding the right of neutrals at sea.

With regard to neutral navigation, however, the *Ordonnance* did not follow the liberal principles of the *Consolato del Mare*. On this head the *Ordonnance* enacted the following rule, in Art. 7.

"*Tous navires qui se trouveront chargés d'effets appartenont a nos ennemis, et les merchandises de nos sujets ou allies qui se trouveront dans un navire ennemi, seront pareillement de boune prise.*"

This rule revived the ancient principle of the Ordinances of François I. of the year 1533 and 1543 and of Henry III. of 1584, contained in the formula "enemy's ship, enemy's goods" and in the rule of Roman Law, "*la robe d'ennemi confisque celle d'ami.*" By this rule, which makes not only neutral goods carried in enemy's ship liable to confiscation, but also neutral vessels when laden with enemy's goods, the commerce of neutrals is limited to the carrying of their own goods by their own vessels.

* WHEATON. Histoire du Droit des Gens etc. Edit. 1853. Vol. I page 88.

This rule was, however, not applied to the vessels or goods of any Nation excepting those with which France had no treaty on this subject. The treaties concluded between France and other Nations generally adopted the two rules "*free ship, free goods*" and "*enemy's ship confiscable goods*," which rules were, after the peace of Utrecht (1713), generally accepted by nearly all of the Maritime Powers. This Code, which was afterwards supplemented by the Ordinance of 21st of October 1744, with regard to a distinction to be made, in neutral trade, between trade carried on with an enemy's port and the trade between neutral ports, obtained great respect as an authority for prize-courts and it was generally viewed as authoritative in the tribunals of most maritime States of Europe and especially in England. *

The foregoing codes, compilations and ordinances on matters of Maritime Law form the basis of most of the commercial codes and navigation acts of the present century in Europe and America. †

* WHEATON. Histoire du Droit des Gens etc. Edit. 1853. Vol. I. pp. 149–153. CALVO. Le Droit International. Edit 1870. Vol. I. p. 32.

† A complete treatise of the old Maritime Laws is to be found in the work of J. A. Engelbrecht, under the title, *Corpus Juris Nautici. oder Sammlung aller Seerechte der bekanntesten handelnden Nationen alter und neuer Zeiten, nebst den Assecuranz, Havarey, und anderen zu den Seerechten gehörenden Ordnungen. Zusammengetragen und zum Theil ins Deutsche übersetzt. Lübeck. 1790.*

The table of contents is as follows :—

I. Rhodian Maritime Law.
II. Collection of Maritime Rules of the Roman Law.
III. Maritime Law of Oleron.
VI. Maritime Law of Wisby.
V. Maritime Law of the German Free Towns (Deutsche Freie Reichstädte).
VI. The Hanseatic Maritime Law.
VII. The Navigation Laws of King Peter of Arragon. Regulations of Barcelona and Florence.
VIII. The old Maritime Law of Riga.
IX. The Danish Maritime Law.
X. The Consolato del Mare.
XI. Rules for armed cruisers.

TABLE OF CONTENTS.

VOL. I.

PREFATORY NOTE.

Part I.

GENERAL PRINCIPLES.

CHAPTER I.

ORIGIN OF LAW.

Pages.

§ 1. The Universal Law of Nature. The Spirit of Creation or Universal Cause. Hypotheses in general. The forces of Nature. Hypothetical Demonstration of the Universal Law of Nature in its course of Evolution. Stages of Creation. The Physico-mental Organism and the Moral-mental Organism of Man. Matter. Struggle between the Moral and the Material Elements. Martyrdom. Materialism. Origin of Species. The Links of Evolution. Impossibility of Demonstrating the Primary Motor of Evolution. Intellect. Hypothesis regarding Intuition. Feeling. Feeling versus Imagination. The Soul. The Moral Law of Nature is the Origin of Law *(Jus, Droit, Recht)*. 3–18

CHAPTER II.

DEVELOPMENT OF THE MORAL LAW AND CIVILIZATION.

§ 2. Primary Truths. The Good. The Moral Senses, viz.: Conscience and Sympathy. Righteousness. The Standard of the Good. § 3. Origin of Evil and its control. Religion. Moral Doubt. Manifestation of the Soul. Christianity. The Creator. The "Occasions of Stumbling." § 4. Influence of the Moral Law of Nature on the general welfare and the material development of Society. § 5. Moral and Physical Truths. The "Law of the Conditioned." § 6. Conscience. § 7. The Law of Conscience. § 8. Craving after Rules for International Conduct. § 9. Cause of that Craving. Grotius. §10. The Popular Conscience. § 11. The National Spirit of Law. § 12. Common Sense. § 13. The Empirical School. § 14. The International Spirit of Law. § 15. The Philosophy of Law and the Historical School. 19

CHAPTER III.

INTERNATIONAL LAW AND ITS JURISPRUDENCE. *Pages.*

§ 16. Origin of States. Natural and Political Nationality. Conditions for the Political Individuality of States as Persons of International Law. § 17. Rights and Obligations of States. International Morality. § 18. The dealings of State towards State tested by the Moral Law of Nature. § 19. International Law. International Jurisprudence. Diplomacy. § 20. International Legislation supplied by International Jurisprudence. § 21. Present Condition and Definition of International Law. State Policy. Justice versus Power. § 22. The Ethico-Historical system of International Jurisprudence. The Philosophical or Idealistic School and the Historico-Pratical School combined in the Ethico-Historical Theory..... 54–76

CHAPTER IV.

HISTORY OF INTERNATIONAL LAW.

§ 23. Historical Sketch of the development of International Law..... 77–78

Part II.

THE INDIVIDUAL RIGHTS OF STATES AND THE MODIFICATIONS OF THESE RIGHTS.

CHAPTER V.

THE SOVEREIGNTY RIGHTS OF STATES.

§ 24. Sovereignty and Autonomy. Government. Sovereign States. Right to Recognition. Union of Crowns (Unio Personalis). Neutral States. Protected Sovereignty. Colonial Protectorates. Tributary States. Difference between Protectorate and Tributary Obligations. § 25. Union of Sovereign States. Perfect and Imperfect Union, Federal and Confederate Unions. Distinction between a Confederacy *(Staaten-und)* and a Federal Union *(Bundesstaat)*. § 26. The differ- Rights of Soverign States, and their Classification as damental or Absolute and Conditional or Occasional Rights. se Rights enumerated. § 27. Rights of Existence, from

which devolve those of Self-preservation and Self-defence. *Pages.*
§ 28. Right of Independence. § 29. Right of Equality. Right of Respect and Reputation. Mutual understanding with regard to the Right of Respect. Comity between individual States. International Comity. 81–95

CHAPTER VI.

Right of Property and Territorial Rights.

§ 30. Private and Public State Property. Eminent Domain. Territorial Rights. Alienation of Territorial Rights. § 31. Legal Modes of Acquisition of Territorial Rights by a State. § 32. Right of Occupation. Usucapion and Prescription; Acquisition by Prescription. § 33. The Fait-accompli..... 96–102

CHAPTER VII.

Colonial Possessions.

§ 34. Origin of Colonization. § 35. Principles of Modern Colonial Policy. Acquisition of Trans-Oceanic Possessions. War with Savages. Punishment of same. § 36. Responsibilities and Rights of Colonial Powers, ...103–109

CHAPTER VIII.

Right of Legislation and Jurisdiction.

§ 37. General Principles of the Legislation and Jurisdiction of a state. Public Law. Law of Persons. Private Law. Civil Law. Political Law *(Staatsrecht)*. Public Law includes Public International Law. Civil Law includes Private International Law. § 38. Legislation and Jurisdiction of a State with regard to its external relations. External relations of the Public Law of a State. International conflict of Laws....110–116

CHAPTER IX.

Jurisdiction of Persons. Determination of Nationality.

§ 39. Determination of Nationality. Natural or Tribal Nationality and Political Nationality. § 40. Nationality of Domicile. Domiciliation and its effects. § 41. Obligations of a State with regard to Foreigners temporarily domiciled in it, or passing through its territories. The Foreigners' Right. § 42. Naturalization and Expatriation. § 43. Emigration. § 44. Droit d'Asile and Extradition. Military and Naval Deserters. Simple and Qualified Desertion. Rules regarding the Re-integration of Seamen, deserting their vessels in the territorial waters of a Foreign State. § 45. Modifications of the Sover-

eignty Right of Jurisdiction. § 46. Exterritoriality. § 47. Self-jurisdiction. § 48. Abandoned Jurisdiction. § 49. Concurrent Jurisdiction. ..... *Pages.* 117–141

CHAPTER X.

Private International Law.

I.—*General Observations.*

§ 50. International Usages with regard to conflict of Laws. Definition of Private International Law. Difference between Private International Law and Comity. *Locus regit actum.* Sources of Private International Law. Subject-matter of Private International Law treated in this Chapter. Works on Private International Law. 142–150

II.—*Personal Status.*

§ 51. Personal Status *(Statuta Personalia).* Personal Status of Corporations. Personal Status of the Alien. Personal Status of the Foreigner in the time of Grotius. Personal Status of Domiciled Foreigners under the present state of International Law. Litigation between temporary residents. Suits with regard to properties outside the State. Personal Status of domiciled Foreigners in the United States of America. 150–158

III.—*The Lex Fori.*

§ 52. Competency of Foreign Law Courts (the *lex fori*). Ordinatoria and Decisoria Forms. International Treaties belonging to the *lex fori.* 158–160

IV.—*Marriage and Divorce.*

§ 53. Marriages and Divorces follow the rule *lex loci regit actum.* Nuptial Contracts. Foreign Divorces. Husband and Wife. Parent and Child. Guardian and Ward. ... 160–169

V.—*Real and Movable Property.*

§ 54. Real Property. Personal Property. *Lex loci rei sitæ. Lex Domicilii.* Instruments relating to personal property are governed by the *lex domicilii.* Litigation with regard to properties (real or personal) situated in foreign countries.... 170–171

VI.—*Legal Obligations and Contracts.*

§ 55. Legal Obligations. The Law of Contracts. Exceptions on the rule *lex loci contractus.* 172–177

VII.—*Limitation and Prescription. Legal Remedies.*

§ 56. Limitation and Prescription. Legal Remedies. 177–180

VIII.—*Wills and Succession.*

§ 57. Wills. Intestacy. Succession, testamentary and ab-intestato. American Laws. ..... *Pages.* 180–185

IX.—*The Lex Mercatoria.*

§ 58. Commercial Laws. *Lex Mercatoria* (the *law merchant*). Traders and acts of Commerce. Objects of the *lex mercatoria*. Partnership and Corporations. American Laws on Public Companies. Professor von Bar's opinion on the status of foreign Corporations. Mr. Gillespie's note on Corporations. Justice Lindley's opinion. Principles of the German Courts. Convention between the Netherlands and Italy with regard to mutual recognition of *Sociétés Anonymes*. Merchant's Books. Merchant's Books, as evidence in Law Courts. Laws governing the status and legal capacity and competency of Traders. Legal interest..... 185–202

X.—*Bills of Exchange.*

§ 59. Nature of the Contract of Exchange. Legal aspects of the Bill of Exchange. Re-exchange. Conflict of Laws with regard to the contract of Exchange. The German and the French systems. Laws of Great Britain and of the United States of America. The *lex loci contractus* and the *lex loci solutionis* with regard to Bills of Exchange. Protest of Bills. Moratorium with regard to Bills of Exchange. Rules with regard to Protest and Re-exchange. Opinion of Professor von Bar. 202–217

XI.—*Stoppage in Transitu.*

§ 60. Revendication in matter of Commerce. Sir Robert Phillimore's statements on Stoppage *in transitu*, English decisions. What law governs the right of stoppage *in transitu*. German decision. Stoppage *in transitu* by the buyer..... 217–224

XII.—*Insurance.*

§ 61. General Principles. Subjects of Insurance. General Rules. Contract of Insurance. The Policy. Beginning, duration and end of the risk..... 224–231

§ 62. Marine Insurance, the Policy. Insurance on the Ship. On Goods. On Ship and Goods. Insurance of Bottomry and Respondentia. Valuation of Goods including the Insurance premium, Freight and Customs Duties. Insurance of expected profits and commissions. Valuation of expected profits. Insurance of Freight..... 231–2

XIII.—*Average.*

Pages.

§ 63. General Principles. General Average. Voluntary Stranding. Particular Average Loss. Average with regard to Goods in lighters. Average for which the Master is liable. Average Accustomed. (Petty Averages). Arnould's principle of Average. Total loss on goods. Goods warranted free of Average. Adjustment of Damages. Rules for deducting one third new for old, except in the case of iron ships. Cases where repairs exceed three-fourths of the value, or other portion as stated by the *lex loci contractus*. Aggregation of losses. 249–263

§ 64. Assessment and Apportionment of Gross or General Average. Place of adjustment of General Average. Jettison. Valuation of Jettison. Deck Cargo. Ship after Jettison. Assessment on Goods lost by the fault of the Shipper. Goods rescued after Jettison. General Average according to English Law. The place of destination is the place at which the Average is to be adjusted and conformable to the laws of that place. Sir Robert Phillimore's statements. 264–272

XIV.—*Abandonment.*

§ 65. Reasons of Abandonment. Abandonment of ship. Of Goods. Total loss; constructive total loss. Opinion of Arnould with regard to constructive total loss.....272–277

XV.—*Shipping Laws.*

§ 66. Sea-going vessels. Registration and transfer of sea-going Vessels. Privileged debts. 278–282

§ 67. Owners, Managers and Joint-owners. The manager or Ship's Husband. Claims of a discharged Master on the Ship's Husband. 282–286

XVI.—*Shipmasters, Officers and Crew.*

§ 68. The Masters. Provisional receipt for shipped goods. Ship's papers. Report to Manager. Responsibility of the Pilot. Unsafe Ports. Master's duty in case the flag be unfree. Master's duty in cases of Seizure of the vessel. In case of Average; Jettison. In case of Blockaded Ports. In case of want of provisions at sea. Liability of the Master when acting without instructions from owners. Report from Port of shelter. Report of Voyage before the Consul or other competent authority. Sea-protest. Master's Account. Settlement of Master's claims. 286–296

§ 69. Extra Repairs and necessaries during the voyage, supplied on the authority of the master. 296–297

§ 70. Ship's officers and Seamen; their rights and duties. *Pages.* The Ship's articles. Ship's discipline. Liability to damages. Liabilities of the Chief-Officer. Rules concerning wages. Profits and indemnities. Freight earned is accountable for wages, when proceeds of wreck are insufficient. Extra services to be rewarded. Sick and wounded in ship's service to be properly cared for. The effects of deceased seamen to be taken care of. Discharge of seamen. Lawful reasons for discharge. Lawful reasons for declining service. Lawful reasons for complaints. Paying off at the end of the voyage. Obligation of the ship's officers and crew after the completion of the voyage, or when ship is lost or captured. Barratry.....297–310

XVII.—*Freighting and Charter-party.*

§ 71. Freighting and Charter-party. Lay-days and demurrage. Capacity of the ship. Time and mode of chartering and payment.....310–313

§ 72. Rights and obligations of parties to the Contract of affreightment. Laws which govern the Contract of affreightment. Dissolution of contracts of affreightment. 313–324

§ 73. Nature and legal aspects of the bill of Lading. Rules with regard to the bill of lading. 324–330

XVIII.—*Passengers.*

§ 74. Rules regarding Passengers and Passage-money....330–332

XIX.—*Bottomry.*

§ 75. Bottomry and Respondentia. Nature and legal aspects of the Bottomry Contract. Rules with regard to Bottomry and Respondentia. Bottomry Contracts are governed by the *lex loci contractus* and by the *law of the flag*. Liability of owners. Order of Preference. 332–338

XX.—*Prescription of Maritime Contracts.*

§ 76. General principles with regard to the Prescription of Maritime Contracts. 338–340

XXI.—*Collision.*

§ 77. Collision. Rules with regard to the adjudication of collision. Rules for the adjustment of damages. Liability of Owners. Sir Robert Phillimore's opinion. English Law....340–344

XXII.—*Salvage.*

§ 78. Salvage. *Wrecks and Casualties.* Salvage in cases of shipwreck and Flotson at Sea. Salvage in cases of Stranding and goods washed on shore. Receiver of Wreck.

Duties of the respective Consuls. Distinction between Remuneration for Help and Salvage-money. Adjudication of remuneration for help and salvage-money. ..... 344–351 *Pages.*

XXIII.—*Insolvency and Bankruptcy.*

§ 79. Objects of Bankruptcy laws. Comparative legislation in Bankruptcy. Insolvency. Bankruptcy. Simple Bankruptcy. Fraudulent Bankruptcy. General Rules with regard to Insolvent or Bankrupt Estates. Filing Declaration of Insolvency. Petition of Creditors for adjudication of Insolvency. Insolvent estate of a deceased person. Legal effects of the adjudication of insolvency; Effect upon execution by seizure of goods; Effect upon suits; upon sales begun with; upon transactions commenced shortly before the declaration of insolvency; upon monies, mortgages or pledges. Donations. Deeds. Debts exigible after time; Conditional properties of estate. Conditional debts secured by pledge. Debts secured by mortgage. Annuities and Life-rents. 351–362

§ 80. Curators or Assignees in the insolvent estate. Arrest of the bankrupt and his release on bail. Right of appeal of the debtor and of his creditors. Duties of Curators or Assignees. Places and modes of publication with regard to the insolvent estate. The seals. Carrying on of the trade. Inventory of the estate. The Balance-sheet. Witnesses to be heard. Household support during liquidation. Verification of claims. List of acknowledged creditors, ... 362–369

§ 81. Composition in Insolvency. Discharge on granting the Composition. 369–372

§ 82. Adjustment of the Insolvent Estate. Rank and Classification of Creditors. Publishing the Statement of Classification. Claims of the wife outside the community of goods. International Usages of Law Courts, with regard to the power of Curators or Assignees. 372–377

§ 83. Rehabilitation of the Insolvent. Certificates of Discharge. Certificates of discharge with regard to International usages. 377–379

XXIV.—*Surcease of Payment.*

§ 84. Surcease of payment a personal *moratorium*..... 379–380

XXV. *Foreign Judgments and Foreign Legal Instruments. Evidence of Foreign Laws. Commissions Rogatoires.*

§ 85. Judgment of Foreign Courts *(Res Judicata)*. Exterritorial operation of Foreign Judgments. In Criminal Cases. *Personam*. *Ad rem*. Opinions of Halleck and Wheaton.... 380–383

§ 86. Evidence of Foreign Laws, Wills, Contracts and other Instruments. Legalisation of Signatures..... *Pages.* 383–384
§ 87. *Commissions Rogatoires.* Hearing of Witnesses; serving of Writs, Citations, etc. Rules proposed by the *Institut de Droit International.* 384–391

Part III.

MARITIME AND COMMERCIAL INTERNATIONAL LAW.

CHAPTER XI.

THE OPEN SEA, MARITIME DOMAIN AND TERRITORIAL WATERS AND THEIR JURISDICTION.

§ 88. *Mare Liberum.* 395–396
§ 89. Maritime Domain *(Mare Clausum).* The King's Chambers..... 396–399
§ 90. Territorial Waters (Adjacent Seas) Maritime Territorial Jurisdiction..... 399–401
§ 91. Narrow Seas. Canals. Boundary of Territorial Waters in narrow channels. 401–403
§ 92. International character of rivers, lakes and inland seas. The *Thalweg.* 403–404
§ 93. What is meant by *Internationally free navigation.* Coast-fishery, *(pêche-cotière, Küstenfischerei).* Coast trade navigation *(cabotage, Küsten frachtfarht).* 404–405
§ 94. Search to execute revenue-laws in adjacent waters,... 405–406

CHAPTER XII.

INTERNATIONAL POLICE AND CONTROL ON SEAS WITHOUT JURISDICTION.

§ 95. The Open Sea subject to International Law. 407–408
§ 96. Every vessel navigating the Sea *must* belong to an acknowledged nationality..... 408–409
§ 97. The Right of Approach *(Droit d'Enquête du Pavillon).* Mr. Hall's opinion with regard International Police and control in places not within the territory of any State. Rights from which the *Right of Approach* is evolved. Decision of the Supreme Court of the United States of America with regard to the right of approach..... 409-

CHAPTER XIII.

PIRACY.

§ 98. Definition of Piracy. General character of piratical acts. The Barbary States. Opinion of Bynkershoek. Are the crews of rebel vessels pirates? The Cruisers of the late Confederate States. The Peruvian Insurgent vessel *Huascar*. ..... *Pages.* 413–420

CHAPTER XIV.

SLAVE TRADE.

§ 99. Treaties for the suppression of the slave trade. Treaty between Great Britain and France regarding Right of Visit. Instruction to Commanding Officers of Cruisers. Treaty between Great Britain and the United States of America settling the question of *visit* and *search*..... 421–425

§ 100. Fugitive Slaves. Report of the Commissioners on Fugitive Slaves. Circular of the British Admiralty of August 16, 1879, with regard to Fugitive Slaves..... 425–431

§ 101. Municipal legislation with regard to the suppression of the slave trade. Grotius. 431–432

CHAPTER XV.

NATIONAL CHARACTER AND JURISDICTION OF VESSELS.

I.—*Nationality of Private or Merchant Vessels.*

§ 102. Private or Merchant Vessels..... 433–434

II.—*Outward tokens of Nationality.*

§ 103. Flag. Name. 434–435

III.—*Ship's Papers.*

§ 104. Papers carried by Private Vessels in evidence of their nationality and other documents to be kept on board. ...436–438

IV.—*Public Vessels.*

§ 105. Public Vessels. Vessels of War. 438–440

§ 106. Vessels of recognized Yacht-Clubs..... 440

§ 107. Privileges of Public Vessels in foreign territorial waters. 441

V.—*The International Status of Public and Private Vessels compared.*

§ 108. Essential distinction between Public or State Vessels and Private Vessels with regard to national jurisdiction and International Status. 441–443

§ 109. Distinction between the respective characters of Public and Private Vessels. Acts committed on the high sea on board a Private Vessel. Actions arising from collision and salvage claims with regard to Private vessels and with regard

to Public Vessels. Obligations of foreign vessels in the territorial waters of a friendly State. Mail Boats (Paque-bots-Poste). Private vessels subject to local jurisdiction in foreign territorial waters. Ortolan's opinion with regard to the juridical character of private vessels. Chief Justice Marshall's opinion. Mr. Hall's opinion. 443–452

VI.—*Concurrent Jurisdiction over Foreign Private Vessels in Territorial Waters.*

§ 110. Concurrent Consular Jurisdiction. 452–454

§ 111. Consular Protection. Consular Jurisdiction with regard to foreign members of the Crew of Vessels of Consul's Nationality, and likewise in the condition of Exterritoriality or Capitulation. 454

VII.—*Droit d'Asile and Extradition with regard to vessels in territorial waters in time of peace.*

§ 112. General remarks. 454–455

§ 113. Inviolability of territorial waters by foreign revenue cruisers. Exception of this rule. 456–457

§ 114. Asylum claimed by revenue cruisers *(guarda costa)* with vessels in custody. Different aspects:—*a*, both the revenue cruiser and the vessel in her custody belong to the same nationality: *b*, the arrested vessel belongs to the nationality of the State in whose territorial waters the foreign arresting revenue cruiser or public vessel takes refuge with her prisoner; *c*, the arrested vessel belongs to the nationality of a third friendly Power. 457–460

CHAPTER XVI.

Objects of Maritime International Protection.

§ 115. Principle of Maritime International Protection. 461–462

§ 116. Objects of Maritime International Protection. 462

§ 117. International rules of the Road at Sea. Sections 16 and 17 of 36 and 37 Vict. c. 85. Obligation to stand by each other after collision. Salvage after collision. Obligation to observe regulations. British statutory rule as to presumption of fault when regulations are infringed (§§ 16 and 17 of 36 and 37 Vict. c. 85). Application of these rules to foreign vessels. American Laws. 462–471

§ 118. The International Code of Signals. 471–472

§ 119. Life Boat Institutions. 472–473

§ 120. Pilotage necessarily an object for International agreement. Compulsory Pilotage with different States. Principles of British Law regarding Compulsory Pilotage. Compulsory Pilotage in the Suez-Canal. 473–479

§ 121. Sea Fishery. The Hague Fishery Convention of 1882. ..... *Pages.* 479–480

INTERNATIONAL POSTAL AND TELEGRAPHIC COMMUNICATION.

§ 122. Universal Postal Union. 480–481
§ 123. Telegraphic Union. Resolution of the Institut de Droit International with regard to Submarine Telegraph Cables. 481–483
§ 124. International Convention of 18th March, 1884, for the protection of Submarine Cables in time of peace. 483–489

CHAPTER XVII.

HISTORICAL SKETCH OF MARITIME AND COMMERCIAL INTERNATIONAL LAW.

§ 125. Sources of Maritime International Law. 490–491
§ 126. Historical Sketch of Maritime and Commercial Laws. 491–493
§ 127. Early Maritime and Commercial Laws. 493–498

END OF VOL. I.

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